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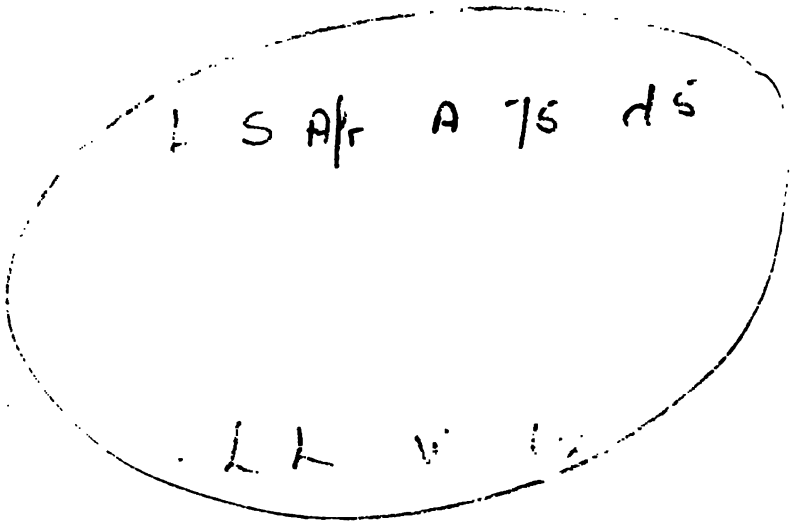

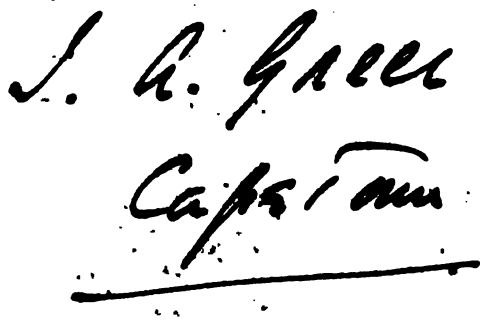

CASES

DECIDED

IN THE SUPREME COURT

OF THE

CAPE OF GOOD HOPE,

AS REPORTED BY THE LATE

HON. WILLIAM MENZIES, ESQUIRE

(SENIOR PUISNE JUDGE OF THE SUPREME COURT).

VOLUME III.

850

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ADVOCATE.

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MENZIES' REPORTS.

[NEW SERIES.]

1828–1849.

VOL. III. PART I.

HILL *vs.* WALLACE.

Injury, verbal. "Coward" held actionable.

Defamation, action for, brought by one ship-passenger, a foreigner, against another, also a foreigner, for defamation. [*No objection was, however, raised as to the validity of the precedent arrest, or as to the jurisdiction of the Court. Et quære.*] 1828. Oct. 8.

[Vol. I, p. 347.]

RUTHVEN *vs.* POGGENPOEL.

Injury, verbal. Held not actionable for the maker of a promissory note to say to the holder on its presentation for payment: "The whole of the said note has been paid long ago, and I owe plaintiff nothing," the fact being that a balance was still due. 1829. Sept. 4.

[Vol. I, p. 380.]

MACKAY *vs.* PHILIP.

Injury, literal. Publication. Animus injuriandi. Veritas convitii. Pleading. Justification. Right to begin.

On action brought against the writer and publisher of a certain work, entitled "Researches in South Africa," by a Colonial Landdrost (or Magistrate), for defama- 1830. July 5. „ 16.

1830. July 5. „ 16. *tory statements therein made: the defendant pleaded the exceptio declinatoria fori (i.e., non-jurisdiction), on the ground that the grievances complained of were committed in England. This the plaintiff's replication denied. Held that the exceptio declinatoria fori must be founded on some fact alleged in the declaration, or admitted by the plaintiff: wherefore the exception was overruled.*

It is no ground of exception to an action for libel that the libellous work was published in England. Copies having been circulated in the Colony, the Court held the writer, on his return to the Colony, where he had his domicile, to be answerable in such action.

Where both the general issue and a plea of justification are pleaded to a declaration for libel, it is for the plaintiff to sum up first on evidence led, and not defendant on his justification.

Veritas convitii (i.e., truth of the libellous words) is an answer to the action. So also is (as regards damages) the absence of any animus injuriandi: but proof that the defendant is not the original author or inventor, but merely the publisher of the statement complained of, will not in any way excuse.

[Vol. I, p. 455.]

HORSTOK *vs.* BONIFACE AND OTHERS.

Injury, literal. Pleading. Uncertainty in plea. Application of libel. Evidence. Witness.

1830. Sept. 7. *The following words held actionable: "Singular epitaph on a quack doctor: Hereunder rots the corpse of Lubbert Marmoriset, escaped, God knows where, as village or ship barber. Roman Catholic layman, yea, half priest, vile hypocrite, defamer of his wife, that faithless proselyte, too stupid for the syringe, run away hospital nurse, useless either to man or beast, pitiful scribbler; in short here is a quack, a man-murderer."*

Application of libel to a particular person proved by witnesses. but evidence proposed to be offered of witnesses who had read the epitaph, but who had not seen its application, refused for immateriality.

Witness, refusal of, to answer, for fear of self-crimination. Criminal prosecution for libel.

[Vol. I, p. 467.]

POWEL AND HER HUSBAND *vs.* PRICE.

1830. Dec. 28.

Injury, verbal. It is not actionable to speak the following words in rixâ (i.e., in a brawl), "damned informer, damned rascal, damned vagabond, damned broken-nosed informer." Compensated by retort of "liar," and shaking fist in face.

Supplemental oath, when ought not to have been allowed by Resident Magistrate.

[Vol. I, p. 500.]

WOLFF *vs.* VAN HELLINGS.

1831. June 22.

Injury, verbal. "Jou gemeene bliksem; jou bliksemsche smeerlap" (equivalent to "You low rascal, you rascally blackguard"), are words not actionable in an action ad palinodiam for amende honorable et profitable. So held by majority of Court (WYLDE, C.J., BURTON, J., *and* KEKEWICH, J.; MENZIES, J., *dis.*)

[Vol. I, p. 529.]

SPARKS *vs.* HART.

Verbal injury. Justification. Veritas convitii. Pleading. Exception.

Veritas convitii cannot be pleaded in justification of words charging plaintiff with indecency and immodesty.

Per WYLDE, C.J.—*A plea of justification to a declaration containing only one count must justify the whole of such count, and not deny one part and avoid another part thereof.*

Per MENZIES, J.—*Such justification can be competently pleaded to part only. Veritas convitii can only be pleaded in justification where there is an absence of an animus injuriandi, which absence the law will presume in the accusation of a criminal act, or for the ends of public justice. Indecency and immodesty are not such acts.*

Per KEKEWICH, J.—*Semble. Agreed with* WYLDE, C.J.

1833. Feb. 5.

Sparks vs. Hart.

This was an action brought by plaintiff, the widow of an officer of the army, against the defendant, for having spoken of and concerning the plaintiff, at sundry times and places, and to and in the hearing of sundry persons specified in the declaration, the following defamatory words:

1833. Feb. 5. — Sparks vs. Hart.

1st. "Mrs. Sparks is keeping a criminal intercourse with a certain gentleman in this town, and she is in consequence of such intercourse at this moment in a state of pregnancy."

2nd. "You (meaning the plaintiff) have conducted yourself infamously. I and my family were obliged to quit your house in consequence of your immodest conduct."

3rd. "I (meaning the defendant) am surprised that you (meaning one D. O'Kelly, to whom defendant was then speaking), are going to live at Mrs. Sparks, after what I have told you of her infamous conduct."

The defendant pleaded first the general issue, and as a plea in justification of the defamatory words above quoted in the paragraphs marked Nos. 2 and 3, stated certain highly indecent and immodest acts, alleged by him to have been committed by the plaintiff with one D. P., before the speaking of the said defamatory words last mentioned, of such a nature as, if true, to warrant at least a strong suspicion of a criminal intercourse between the plaintiff and D. P. The last clause of this plea in justification charged that the plaintiff "at divers other times between the 1st of February and the 30th May last past, other indecent and immodest acts with the said D. P. then and there did."

The plaintiff excepted to the above plea in justification, that it was "inartificially pleaded, inasmuch as the same has placed upon the records of the Court matters and allegations which do not in law amount to a justification of the slander complained of, and also because the said plea is vague and uncertain, in respect of certain supposed indecent and immodest acts alleged to have been committed by the said plaintiff at divers times between the 1st of February and 30th March last, whereto the said plaintiff is therefore not enabled to reply."

In support of the exception, and particularly to show that in this case the *veritas convitii* could not be pleaded as a justification, *Cloete*, for the plaintiff, quoted *Grotius Inl.*, 3, 36, § 2; *Van Leeuwen, Censura Forensis*, 5, 25, § 1, 2; *Voet*, 47, 10, § 9, *in medio*. 2ndly. He maintained that, although the *veritas convitii* might be pleaded as a justification, yet that the defendant ought not to have stated in the plea the name of the person with whom the immodest acts were alleged to have been committed. 3rdly. He maintained that the words "at divers other times between the 1st of February and the 30th of May last past, other indecent and immodest acts with the said D. Page then and there did" were too vague and uncertain to be deemed relevant.

Attorney-General, contra, quoted *Matthæus, page* 145; *Holt on Libel, p.* 9, *&c., and* 273, *&c.*; *Chitty*, 1,033; *and Chitty, 4th Edition, vol.* 1, *page* 433; *Voet*, 47, 10, 8 *and* 9;

Wissenbach, pars 2nda, Dist. 30, *page* 452; *Van der Keessel,* 803.

WYLDE, C.J., was of opinion that the exception ought to be sustained, and that the plea was bad, because he held that the plea of justification was a plea in bar, and that a plea in bar must go to the whole cause of action, so that if it be sustained the plaintiff must be held to have had no ground of action at all, and therefore that as the facts pleaded in justification were not and could not be pleaded in justification of the words, "Mrs. S. is keeping a criminal intercourse with a certain gentleman in this town, and is in consequence of such intercourse at this moment in a state of pregnancy," they could not be pleaded in justification of the words charging the plaintiff with immodesty, and that although the defendant had altogether denied having uttered the words above mentioned, yet that this made no difference, because this declaration must be considered as consisting of only one count; that neither by the English Rules of Pleading, nor by the 19th Rule of this Court, was it competent for a defendant to deny one part and to avoid another part of the same count, and in support of this doctrine quoted *Chitty, vol.* 3, *p.* 1,032. He also held that by the Law of the Colony the *veritas convitii* could not be pleaded in justification of slander accusing the plaintiff merely of immodesty.

MENZIES, J., held, on the authority of the 19th Rule and of the note in *Chitty, vol.* 3, *p.* 1,032, *4th Edition,* that it is competent for a defendant to deny having spoken part of the words in any particular count, and to justify the speaking of another part of the words in that count; and that, therefore, although this declaration should be considered as one count, the defendant having denied part of the words, which it was alleged he had spoken, was entitled to justify the speaking of that other part of the words alleged to have been spoken by him which he admitted that he had spoken. That the matter in the last clause of the plea was inartificially pleaded as being vague and uncertain. (*See Holt, page* 273.) But he was of opinion that by the law of this Colony *veritas convitii* cannot be pleaded in justification, except where, in uttering the *convitium,* there was no *animus injuriandi* on the part of the defendant. That although the law presumed the absence of *animus injuriandi,* when the *convitium* accused the plaintiff of an act which by law is punishable as a crime, and when the accusation has been made for the ends of public justice, yet indecency or immodesty committed in the manner charged in the declaration is not a crime punishable by law, and therefore that as the defendant had not alleged or offered to prove

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any facts to negative the existence of *animus injuriandi* on his part, or that the publication of the defamatory words had been made under such circumstances as to be deemed in law privileged, he was not entitled to plead the *veritas convitii* as a justification of his having charged the plaintiff with having been indecent or immodest as set forth in the plea.

KEKEWICH, J., stated that as there was enough to enable him to decide the cause on another ground, he did not mean to express any opinion on the question on which the other two Judges had differed in opinion. He, however, considered that this declaration was to be taken as containing only one count, and that a plea in justification must meet the whole of the slander in justification of which it was pleaded. He concurred with both Judges that in this case *veritas convitii* could not be pleaded to justify the words spoken by defendant, charging plaintiff with immodesty, either according to the English practice or the Dutch law.

Exception sustained with costs. Plea to be taken off the files of the Court, and defendant to plead of new.

SUTHERLAND *vs.* MCDONALD.

Verbal injury. Justification, plea of. Oath of reference. Evidence. Rule of Court 132.

In answer to the following words, written by defendant of and concerning plaintiff, "I was obliged on my arrival out here to get rid of Mr. Sutherland (meaning the plaintiff) in consequence of frauds and delinquency" (meaning that the plaintiff had been guilty of fraud and criminal acts in trade); and farther: "These Sutherlands (meaning the plaintiff and his brother James) have been trading on my capital for the last twelve years to their own benefit, and they will do the same with your property, or that of any other they can get hold of," the defendant justified by proof of an alleged fraud on H. M. Customs. HELD, *a bad plea of justification.*

A document which has not been scheduled and annexed to the plea, as required by Rule of Court No. 132, *cannot be put in evidence.*

Quære: Right of defendant to refer to oath of the plaintiff, truth of plea of justification where his answer might involve self-crimination on a charge of fraud.

The plaintiff brought this action to recover from defendant £100, as damages sustained by him in consequence of the defendant having published of and concerning the plaintiff the following false, malicious, and slanderous words contained in a letter written and subscribed by defendant, and addressed and forwarded by him to one James Davies, of London, merchant: "I was obliged on my arrival out here to get rid of Mr. Sutherland (meaning the plaintiff) in consequence of frauds and delinquency" (meaning that the plaintiff had been guilty of fraud and criminal acts in trade); and farther: "These Sutherlands (meaning the plaintiff and his brother James) have been trading on my capital for the last twelve years to their own benefit, and they will do the same with your property or that of any other they can get hold of."

The defendant pleaded first the general issue; and secondly, in justification of the words, "I was obliged on my arrival out here to get rid of Mr. Sutherland in consequence of frauds and delinquency," he pleaded that in August, 1829, the plaintiff, then in partnership with the defendant, trading under the firm of McDonald and Sutherland, did, without the knowledge of the defendant, ship on board the vessel called the *Sydney Packet*, in Table Bay, 54 hhds. or half-pipes of wine; and did, on the 20th August, 1829, without the knowledge of the defendant, write and subscribe, as for and in the name of the said firm of McDonald and Sutherland, a certificate, and at the foot thereof a declaration, and did appear before W. W. Bird, Esq., Comptroller of Customs for the Port of Table Bay, and without the knowledge or concurrence of the said defendant, took his corporal oath (the said W. W. Bird having then and there authority to administer the same) in the words and figures or to the purport or effect following, that is to say,—

"Certificate of wines shipped in the *Sydney Packet*, Captain Jno. Waring, bound to Liverpool:

Marks and Numbers.	Number of Casks.	Description of Cask.	Description of Wine.	Colour.	Of whom purchased.
N.D. x S. No. 1 @ 30	30	Pipes	Madeira	White	
1 @ 6					Wine farmers in the interior.
1 @ 40	40	Hogsheads			
1 @ 40	40	Quarter Pipes			
1 @ 54	54	Hogsheads	Pontac	Red	

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Sutherland vs. McDonald.

"Cape Town, 20th August, 1829.

"The undersigned hereby declare that the wines above specified and shipped in the brig *Sydney Packet*, Captain John Waring, bound to Liverpool, were purchased by us as above stated, and that the same are, to the best of our knowledge and belief, the produce of this Colony.

"McDONALD AND SUTHERLAND,

"*per* THOMAS SUTHERLAND.

"Sworn before me this 20th day of August, 1829.

"W. WILBERFORCE BIRD,

"Comptroller Customs."

Whereas, in truth and in fact, the said 54 hhds. of wines were not the produce of this Colony, and which the said plaintiff at the time he made the certificate, declaration, and oath aforesaid well knew. And the said defendant saith that the said plaintiff did, by the having made such certificate, declaration, and oath as aforesaid, import or attempt to import into Great Britain wines not the produce of this settlement, under the pretence that the same were wines the produce of this settlement, and thereby did evade or attempt to evade the payment of certain duties, which were by law due and payable upon the said quantity of wines above mentioned.

Wherefore the said defendant saith that the said plaintiff did commit frauds and delinquency, and therefore he justifies the writing of the words hereinbefore mentioned, and this the defendant is ready to verify.

To this the following replication and exception were put in:

And the said plaintiff saith that he denies the same, and joins issue with the said defendant thereon; and with regard to the plea of justification lastly pleaded by the said defendant, the said plaintiff saith that he excepts thereto, because even if he were to admit (which he, however, expressly denies) that the matters of fact and allegations upon which the said plea of justification is founded were true in fact and supported by evidence, yet that the said matters of fact do not in law justify the slander contained in the said defendant's letter of the 15th December, 1831, addressed, &c., &c., or any part thereof; and hereupon he joins issue with the said defendant, and excepts to the plea of justification as pleaded by the said defendant, and prays that the same may be overruled with costs.

After hearing the plaintiff's counsel in support of the exception pleaded by him, the Court then overruled. (*Sed vide, infra,* the judgment afterwards given.)

After the plaintiff had closed his case, the defendant, in proof of his plea of justification, called the following witnesses:—Jacob Scholtz: I am clerk to the Comptroller of Customs. I produce an entry made at the Custom-house on the 13th November, 1828, by plaintiff for McDonald and Sutherland of certain French wine. (Entry put in and read.)

Defendant next proposed to prove by this witness the certificate and declaration referred to and set forth in the plea, and then to put it in evidence.

Cloete objected to this, in respect that the document or paper now proposed to be put in evidence had not been inserted in the schedule annexed to the plea, as required by the Rule of Court No. 132.

The Court held that the document, not being scheduled, could not be put in evidence.

Defendant next called Daniel Kennedy: I was store-keeper to the firm of McDonald and Sutherland. I produced the store-book of the firm kept by me from October, 1828, to January, 1832. (Store-book put in.) The following entries in it, dated 15th, 17th, and 18th August, 1829, were written by me: "15th August.—Shipped on board the *Sydney Packet* 31 half-pipes red wine, marked S, from No. 1 to 31. 17th August.—Shipped on board *Sydney Packet* 16 half-pipes, marked S, from 32 to 47. 18th August. —Shipped do. do. 7 half-pipes, marked S, from 48 to 54." I delivered all these 54 half-pipes or hhds. to the wagon to go to the wharf. All these 54 half-pipes were red wine, all foreign wine, either French or Spanish, I cannot tell which. I superintended the filling of the casks and the marking; they had no other mark than S and the number. I can't swear whether there was not pontac mixed with it. This red wine came in foreign casks from the Custom-house or the wharf. I tasted it. I think it was foreign wine. It tasted neither like port nor claret; something between the two. I never tasted Cape wine like it. Some of it came into our stores in February, 1828. All that came in Februray was put into stukvats. The wine shipped in the *Sydney Packet* was drawn from these stukvats.

John Samuel Merrington: I produce a bill of lading given to me by defendant, dated 21st August, 1829, for 54 half-pipes of Cape wine shipped by McDonald and Sutherland in the *Sydney Packet,* then in Table Bay, bound for Liverpool, to be delivered at Liverpool to the order of the shipper. To the best of my knowledge this bill is filled up

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in the handwriting of Wilkinson, who was clerk to the firm of McDonald and Sutherland.

William Gadney: I am a merchant. The books of McDonald and Sutherland have been placed in my hands by the parties with reference to a submission in which I am arbitrator. I produce the invoice-book of the firm. It contains in the handwriting of the plaintiff the entry of an invoice of certain 18 pipes and 27 hhds. (equal to 63 hhds.) of red wine imported from London, and on the opposite page there is this entry also in the plaintiff's handwriting: "Wine: 54 hhds. per *S. Packet*, 9 J. S., 31st December, 63." The opposite page appears to me to contain an account of the way in which the invoiced goods were disposed of. The book was kept in this way throughout. I produce the invoice-book of the exports of the firm. The entry in page 75 is in plaintiff's writing, and is of an invoice of wines shipped by McDonald and Sutherland by the *Sydney Packet*, but makes no mention of the 54 hhds. pontac red wine.

The defendant here referred the verity of the plea of justification to the oath of the plaintiff, and closed his case.

As a difference of opinion existed on the Bench as to the competency of the oath of reference in the present case, the cause was postponed for further argument.

Postea (10th December, 1833).—The *Attorney-General*, for the defendant, argued in support of his right to refer his plea of justification to the oath of the plaintiff, and quoted *Voet*, 12, *tit.* 2, § 10, 11, 12, 13, 16, 22, 27, 29.

Cloete, in reply, admitted that the judicial oath still existed in the law of this Colony, but to show it was not competent in this case quoted *Voet*, 12, 2, 15; *Censura Forensis*, *part* 2*nd*, 1, 29, 32; *Schorer*, *Not. in Grot. Inleid.* 3, 50, *note to* § 5. *Cæterum notandum recte recusari jusjurandum parti ab adversario delatum, nec præstandum nec referendum esse donec judex decreverit atque adeo delationem probaverit. Voet, n.* 31, *hoc. tit. Et hoc casu præstari recusanti denegatur appellatio, Merula dicto loco, Cass,* 1, *n.* 7, *page* 613. *Indicavit tamen ibi n. seq. exceptiones tum a parte actoris, tum a parte rei. V. G.—Memo jurejurando suam propriam turpitudinem detegere cogitur, et sic Judicavit Flandriæ Curia,* 1708. *Precis Du droit Belg., p.* 234.

Cur. adv. vult.

Postea (31st December, 1833).—The Court having come ultimately to the opinion that the passages contained in the letter, stating that defendant had been obliged to get rid of plaintiff "in consequence of frauds and delinquency,"

and that "these Sutherlands have been trading on my capital for the last twelve years to their own benefit, and they will do the same with your property or that of any other they can get hold of," were not to be taken separately but in conjunction, and that the frauds and delinquency alluded to in the letter related to the trading on defendant's property, and not to any other kinds of fraud and delinquency, and consequently that the plea of justification founded on alleged frauds committed on the revenue, was no justification of the libellous words imputing frauds and delinquency committed by trading on defendant's property. It was thus rendered not competent for the Court to go into the question as to whether the plea of justification was proved or not, or whether the reference of the truth of the justification to the oath of plaintiff was competent to the defendant.

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The Court, therefore, holding that the plaintiff had proved his declaration, gave judgment for plaintiff for £50 damages and costs.

Ryneveld *vs.* Bain.

Injury, verbal. Expressions not libellous. Justification, plea of. Costs.

Held to be no slander to say of the plaintiff, who was in his official capacity the head of a commando (or burgher force), that "he was by no means exculpated from the suspicion at least of having forced them to a disgraceful retreat, if not flight."

Where the defendant pleaded the general issue, and a plea of justification, the Court, in granting absolution from the instance, gave costs on the general issue, but condemned the defendant to pay to plaintiff the costs incurred by the latter with reference to the plea of justification, the defendant having led on evidence in respect thereof at the trial.

1834. Dec. 18. Ryneveld vs. Bain.

This was an action brought by the plaintiff, the Civil Commissioner of Graaff-Reinet, to recover damages from the defendant for having published in the *Zuid-Afrikaan* newspaper, in the form of a letter to the editor, a false and defamatory libel of and concerning the plaintiff respecting his conduct in the execution of his official duty as commander of a certain commando or armed force in pursuit of certain marauders and freebooters, thereby intending to injure the plaintiff n his good name and reputation, and in

1834. Dec. 18. — Eyneveld vs. Bain.

his said office, and to cause it to be suspected that the plaintiff was guilty of misconduct and cowardice in the execution of his said duty.

The declaration set forth the following words as being the libellous matter complained of: "That the burghers were willing to do and actually suffered much on this commando. I (meaning the defendant) verily believe, and join, with Mr. A. (hereby meaning a certain Mr. Aucamp) in hearty thanks to them; but this by no means exculpates the commander (thereby meaning the plaintiff) from the suspicion at least of having forced them to a disgraceful retreat, if not flight."

The defendant pleaded first the general issue, and secondly a plea in justification.

The case was removed for trial to the Circuit Court of Graaf-Reinet.

At the trial the plaintiff called witnesses, who proved the publication of the alleged libel by the defendant, and closed his case.

The defendant called no evidence in support of his plea of justification, but objected that the passage above quoted from the declaration was not libellous.

At the instance of the parties, the point was reserved, and the case removed to the Supreme Court.

This day, after hearing *Cloete* for the plaintiff and *Brand* for the defendant, the Court decided that the passage founded on as the alleged libel was not sufficient to support the action, and therefore absolved the defendant from the instance, with costs on the general issue, but condemned the defendant to pay to the plaintiff the costs incurred by the latter with reference to the plea in justification.

De Lettre *vs.* Kiener.

Verbal injury. Publication.

Semble: *Admission by defendant of authorship of alleged libel does not free plaintiff from the necessity of proving the publication.*

1835. Feb. 26. — De Lettre vs. Kiener.

This was an action brought by plaintiff to recover damages from defendant in respect of a false, scandalous, and malicious libel, which the declaration alleged that the defendant did "write, compose, and publish, or caused to be written, composed, and published in a certain number of a newspaper published in Cape Town, and entitled the *South African Commercial Advertiser*, and which number was published on

the 11th January, 1834, in a letter published in the said number of the said newspaper signed 'Inquirer,' and dated 6th January, 1834," &c., &c.

At the trial, *Cloete*, for the plaintiff, put in the following document, signed by the attorney of the defendant: "I am instructed by Mr. J. A. Keiner to admit, as I do hereby admit, that he is the author and writer of the alleged libellous matter complained off in the above-named cause.—Cape Town, 27th August, 1834.—J. Barker, attorney for Mr. J. A. Kiener."

Also a copy of the *South African Commercial Advertiser*, dated the 11th January, 1834, which was admitted by defendant to be an authentic copy of the newspaper of that name published on the 11th January, 1834. This paper contained the letter signed "Inquirer," the publication of which by the defendant formed the ground of the action.

The plaintiff then called several witnesses to prove the application of the libel to the plaintiff, and closed his case, without leading any further evidence as to the defendant's having published, or caused the libel to be published.

The *Attorney-General* moved for absolution from the instance, in respect that there was no proof whatever of the publication of the letter by the defendant, and quoted *Phillips on Evidence, vol.* 2, *p.* 147, *and Holt on Libel, p.* 244 *et seq.*

Cloete, contra, maintained that the proof of the writing and composing of the letter by the defendant was sufficient to support the action, without any further proof of the publication of the defendant, and quoted *Voet*, 47, 10, 10, and maintained that the commencement of the letter itself: "To the Editor of the *S. A. C. Advertiser:* Sir,—I beg you will insert in your independent journal the following questions, which I offer to the public," proved the publication by the defendant; and secondly, that by the law of this Colony, the writing and composing of the libel is sufficient to render the author and writer liable, although he has not published the libel, or caused or suffered it to be published, and quoted *Voet*, 47, 10, 10.

The Courts absolved the defendant from the instance with costs.

WYLDE, C. J., doubted whether, especially as the letter was addressed to the editor of the paper, in which it had actually been published, the facts of the case did not afford sufficient circumstantial evidence to bring the publication home to the defendant.

The defendant, after hearing the opinion of the other two Judges as to the want of proof of publication, stated that he would rather consent to a nonsuit, than have the case

1836. Feb. 26. — De Lettre vs. Kiener.

postponed for further argument as to the necessity of publication to support an action for damages for libel. Consequently, no decision was formally given on that point. But none of the Judges had any doubt that an action for damages could not be supported for writing or composing a libel which had not been published.

MARTHEZE *vs.* VAN REENEN.

Injury, verbal. General issue, plea of. Proof. Damages. Veritas convitii cannot be proved under plea of general issue, even in mitigation of damages.

[*Sed vide infra, Moodie vs. Fairbairn,* 16th *May,* 1837, where the contrary was deliberately decided.]

1836. Aug. 11. — Marthezes. Van Reenen.

In this case, the plaintiff sued the defendant for damages for alleged recited slander.

The defendant pleaded the general issue.

In the course of the examination of a witness called by the defendant, his counsel put questions, the answers to which, if given in the affirmative, would have tended to prove the *veritas convitii*, but the Courts stopped the defendant's counsel from the further examination of this witness, on the principle laid down in *Starkie* (1830), *vol.* 2, *p.* 87, 99, that the defendant cannot, under the plea of general issue, go into evidence of the truth of the imputation, even for the purpose of mitigating damages.

MOODIE *vs.* FAIRBAIRN.

Injury, verbal. General issue, plea of. Proof. Damages. Defendant. Barring.

Facts tending to mitigate damages may be proved under the general issue, and without being specially pleaded.

Where a defendant who, after being barred, was by order of Court allowed to plead on condition of pleading issuably and then pleaded the general issue and a second plea, which was a bad plea of justification, but set out certain facts—in mitigation of damages, HELD, *that in strictness of practice, he was still in default, and that therefore it was for plaintiff to apply on motion to have the second plea declared irrelevant, and not to file an exception.*

1837. May 16. „ 30. — Moodie vs. Fairbairn.

The declaration in this case set forth *inter alia:*

That whereas before the committing of the several grievances by the defendant as hereinafter mentioned, the said

plaintiff had resided at Graaff-Reinet aforesaid, and had been officially employed in ascertaining and reporting upon the state of the North-eastern Frontier of the said Colony, and the countries beyond it, for the information of the Government of our said Lord the King, in the prosecution of which said official inquiry it became his duty to make diligent researches among the records of various districts in the said Colony; and the said plaintiff had, while so officially employed, always behaved and conducted himself with skill, care, judgment, and integrity, and was, in consideration of his faithful services, permitted to receive the emoluments annexed to the office of Protector of Slaves for the Eastern Districts of the said Colony for some time after the abolition of slavery had taken place therein, to wit, at Graaff-Reinet in the said Colony; yet the said defendant, well knowing the premises, and contriving and maliciously intending to injure him in his said good name, fame, and credit, &c., &c., and to cause it to be suspected and believed that the said plaintiff had been and was guilty of the offences and misconduct hereinafter mentioned to have been charged upon and imputed to him by the said defendant on the 6th of July, 1836, at Cape Town aforesaid, in a certain newspaper called *The South African Commercial Advertiser*, falsely, wickedly, and maliciously did compose and publish, and cause and procure to be published, a certain false, scandalous, malicious, and defamatory, libel, containing the false, scandalous, malicious, defamatory, and libellous matter following of and concerning the said plaintiff, and of and concerning his conduct in the prosecution of the official inquiry, in which he was engaged as aforesaid, that is to say:

"And, on the other hand, the motives of those (meaning the said plaintiff and others) who have attempted the *life and honour* of this gentleman (meaning the new Lieutenant-Governor, Capt. Stockenstrom) in his absence, are as little liable to misconstruction, from the unprincipled place-hunter at Graaff-Reinet (meaning the said plaintiff) to the wretched and most ungrateful of tidewaiters at the Cape, creatures (meaning the said plaintiff and others) of selfishness and malignity, of whom the serpent in the fable was but a type. It is not enough that Capt. Stockenstrom and the cause of good government and national justice triumph in this case. The conspirators (meaning the said plaintiff and others) must be brought into Court. No man's honour, no man's life is secure in a community where individuals drawing the emoluments of an office long after that office has expired (meaning the said plaintiff and the said office of Protector of Slaves for the Eastern Districts in the said Colony) are enabled from that circumstance to lead

1837.
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„ 30.

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the unwary and ill-informed into a belief that they (meaning the said plaintiff) are employed by Government to collect evidence against life and honour. They (meaning the said plaintiff and others) must and shall be brought under the eye of the public, if our *laws* are so defective as to overlook crimes so detestable. When that has been accomplished, our readers will become acquainted with a scene of villainy unparalleled since the days of Titus Oates" (he, the said defendant, thereby then and there meaning that the said plaintiff had been and was guilty of the crime of basely conspiring with other persons to cause the said new Lieutenant-Governor, Capt. Stockenstrom, to be falsely and unjustly accused of some capital crime). By means whereof, &c., &c., &c. Wherefore the plaintiff prayed that the defendant may be adjudged to pay him £1,000 as damages, and costs.

The declaration was filed on the 22nd March, and on the 12th April, the defendant, upon an application to the Chief Justice at Chambers, obtained an order whereby he was allowed twenty-four days farther time to plead, upon his undertaking to plead issuably and close the proceedings, and, if necessary, to accept short notice of trial.

On the 9th May, the defendant filed a plea, in which he pleaded first the general issue, and secondly, for a further plea, pleaded: That the said plaintiff ought not to have or maintain his aforesaid action thereof against him, because he says that, before the committing of the several alleged grievances in the said declaration mentioned, to wit, at the town of Graaff-Reinet, and on or about the 7th April, 1836, the said plaintiff, together with one W. C. van Ryneveld and one William Lloyd, justices of the peace in and for the said district of Graaff-Reinet, did take and receive a deposition of one Pieter Aucamp, made and sworn before them, &c., &c. And the said plaintiff did also on the 14th April, 1836, together with the said William Lloyd, take and receive a deposition of one Charl Pretorius, made and sworn before them, &c., &c.

[Here followed the depositions, which amounted to a charge on Capt. Stockenstrom of having, in revenge for his father's death at the hands of the Kafirs, shot a single young, unarmed Kafir while on commando.]

And the said defendant further saith that at the time when the said depositions were so taken as aforesaid the said Capt. Stockenstrom was not within this Colony, and at the said time, the said Capt. Stockenstrom was not charged by the Clerk of the Peace for the district of Graaff-Reinet, or any other person, with any crime or offence, and the said depositions were not taken by the said plaintiff

and the other persons hereinbefore in that behalf mentioned by way of preparatory examination, or in any other way in the due and legal execution of their office as justices of the peace, or other capacity, and the said depositions, after they were so taken as aforesaid, were never forwarded by the said plaintiff or by the said W. C. van Ryneveld or the said W. Lloyd to the Clerk of the Peace acting for the district for which the said justices were assigned, nor to the Attorney-General of this Colony, but the same were transmitted to the Secretary to Government, to wit, the Honourable Colonel John Bell, and this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiff ought to have his aforesaid action against him.

This day, *Musgrave*, for the plaintiff, referred to the above-mentioned order of the 12th April, 1837, and to the second plea pleaded by the defendant, and maintained that, by pleading this plea, the defendant had not pleaded issuably, inasmuch as by it the defendant neither denied nor confessed and avoided the material facts alleged in the plaintiff's declaration, and he contended that although by his first plea of the general issue the defendant had pleaded issuably, yet that the irrelevant, and therefore objectionable, second plea of the defendant vitiated the whole plea; that the defendant must be held not to have complied with the condition on which, notwithstanding his default, he had been allowed to file his plea, and that the plea filed by him ought to be wholly expunged from the record, and the plaintiff allowed to proceed farther in the cause against the defendant as in default; and quoted *Chitty on Pleading*, 524, 534; 1*st East*. 410, *Comyn* vs. *Sharland*, 5*th Term Reports*, 152.

The *Attorney-General* at first maintained that the second plea was a sufficient plea in justification, but afterwards abandoned this proposition, and contended that the matter contained in the second plea, if verified, would go in mitigation of damages, and therefore that he was entitled to set it out, as he had done, in the second plea, because, if he had not so set it out, he would not have been permitted to give evidence of it in mitigation. 3rdly. He contended that if the second plea was irrelevant and ought to be expunged, still, as he had pleaded the general issue, his plea in so far was a good plea, and by it he had pleaded issuably, and complied with the Judge's order, and therefore that he was not in default, and that the plaintiff was bound to go to trial with him on the plea of the general issue.

The Court (KEKEWICH, J., absent) held that the second plea was not a plea in justification, and that it was irrelevant

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and bad, inasmuch as it neither denied or avoided the facts alleged in the declaration. That it was improper and irregular, when the defendant pleaded the general issue, to set forth in a second separate plea facts which, when proved, would go only to mitigation of damages, and that the defendant would be entitled to prove any facts relevant to mitigation of damages without those facts having been set out in his plea. (*Sed vide Martheze* vs. *Van Reenen*, 11th August, 1836, *ante p.* 14.) They held that the defendant, by pleading the second plea, had disobeyed the Judge's order, and that in strictness his whole plea ought to be expunged from the record, and that he ought to be considered as in default; but with the consent of the plaintiff, the Court ordered the second plea to be expunged from the record, and the defendant's plea of the general issue to remain on record as his plea, the proceedings to be closed and the case set down for trial; and ordered the defendant to pay to the plaintiff the costs of the plaintiff's present application.

The Court held that, under the circumstances of the case, viz., the default of the defendant and the Judge's order, the plaintiff had done right in coming to the Court by motion to have the second plea expunged as irrelevant, instead of filing an exception to it, which would have been the proper mode if such a plea had been filed by a defendant not in default.

In the course of the trial, 25th and 26th May, 1837, the defendant's Counsel admitted having composed and published the alleged libel,—that the plaintiff was one of the parties to whom it was intended to apply,—that the defendant had exceeded the bounds of fair editorial discussion, and was therefore liable in damages, but which he contended ought only to be nominal.

Cur. adv. vult.

Postea (30th May, 1837).—The Court gave the following judgment:

The admissions which have taken place in this case have left no duty to be performed by the Court but to ascertain the proper amount of damages to be paid by the defendant to the plaintiff. The imputations contained in the libel, although evidently intended to apply to others as well as the plaintiff, are of such a nature as to be injurious to his character and reputation, if suffered to obtain belief by no proceedings having been taken by the plaintiff for their public refutation in a court of law, and as if maliciously published would entitle the plaintiff to heavy damages against the defendant. From the publication of statements which are

injurious to the character of another, and which shall not have been proved to be true, the law presumes that the publisher has been actuated by malicious motive. But this presumption may be totally removed or diminished by the circumstances under which the publication took place. There is no proof—it has not been attempted to be maintained, and there is no ground for believing—that in the publication of this libel, the defendant was actuated by any malicious intention of a personal nature against the plaintiff individually. The defendant was the editor of a public newspaper. The subject on which he wrote was one which might fairly and legitimately be made the subject of discussion therein; and as long as he treated it as a matter of public discussion, no wrongful act could have become imputable to him. If, indeed, the plaintiff and the other individuals to whom the libellous article was intended to apply had been guilty of the conduct therein imputed to them, any animadversion, however severe, and any language, however strong, would have been perfectly warrantable. The defendant has maintained that it was under an impression that such had been the case that he wrote and published the libel in question. It was not in the defendant's power to prove the actual existence of such impressions on his part; but the undoubted and indisputable absence of all malice, private and personal, is a ground on which the defendant may fairly claim credit for the truth of his statement as to such being the impression under which he wrote. The defendant has proved that there was an excitement of the public mind on the subject, and that various rumours connecting the plaintiff with it, were prevalent before and at the time of the publication, as also that at that time he must in fact have been ignorant of what part the plaintiff might have taken in the proceedings connected with the subject of that public excitement and prevailing rumours. Under all these circumstances, it appears to the Court, that the defendant, at the time of publishing the libel, was acting solely under political excitement, proceeding from his erroneous impressions as to the real state of the facts, and as to the true nature of the plaintiff's conduct, as far as has been made to appear upon the proof before the Court in this case. Unfortunately for the defendant, under such impressions he has been led to cast imputations upon the plaintiff highly injurious to him. He must therefore make him sufficient amends for the injury he has thus rashly and unwarrantably occasioned. Under all the circumstances, the Court consider that damages to the amount of £50 will meet the justice of the case, with costs of suit.

MYBURGH *vs.* DE VILLIERS.

Injury, verbal. Pleading.

Exception of non-confession or avoidance sustained.

1839. Feb. 14. — Myburgh vs. De Villiers.

In this case, in which the plaintiff claimed damages from the defendant for an alleged libel, the declaration set forth that the plaintiff was one of the deacons and churchwardens of the Dutch Reformed Church at D'Urban, and that the defendant, intending to injure the plaintiff, and to cause it to be suspected and believed that the plaintiff had been guilty of fornication and adultery, did in certain discourses which he had with Mr. Beck, the minister of the said church, on the 1st April, 1838, falsely and maliciously speak and publish, of and concerning the plaintiff, the false, malicious, scandalous, and defamatory words following, viz.: "He, Myburgh, has slept during the night in one room with the wife of J. W. Hurter, and had carnal connexion with her."

The defendant pleaded first the general issue.

2ndly. "That as to the speaking and publishing the following words, 'he, Myburgh, has slept during the night in one room with the wife of J. W. Hurter,' the defendant saith that the plaintiff ought not to have or maintain his action, because he says that before the speaking and publishing of the said words of and concerning the plaintiff in the introductory part of this plea mentioned, to wit, during the night of the 15th February, 1838, the said plaintiff did sleep in one room with the wife of one J. W. Hurter. Wherefore the defendant spoke and published the said words in the introductory part of this plea mentioned as it was lawful for him to do."

3rdly. The defendant pleaded that as to the speaking, &c., of the said words, "He, Myburgh, has slept during the night in one room with the wife of J. W. Hurter," he, the defendant, when he so spoke, &c., then was a churchwarden of the same church in which the plaintiff was a deacon, and that "being such churchwarden, the said words were a charge or information against the said plaintiff, given to him, the said defendant, as such churchwarden, by one P. de Villiers officially, and in order that he, the defendant, might also officially, and as in duty bound as churchwarden, make the said charge known to the minister and churchwardens, which he accordingly did so make known to the said minister and churchwardens, in order that the plaintiff might be brought to a court ecclesiastical to answer to the said charge, as it was lawful for the said defendant to do for the cause aforesaid, and this the defendant is ready to verify."

In his replication, the plaintiff joined issue on the first plea; and as to the second and third pleas, "the plaintiff saith that the same and the matters therein contained, in manner and form as the same are pleaded and set forth, are not sufficient in law to bar or preclude the said plaintiff from having or maintaining his said action, for that the defendant has not by his said second and third pleas denied or confessed, and avoided the allegation in the said declaration complained of. And the said pleas are no answer to the plaintiff's declaration, but are evasive and argumentative. Wherefore, &c., &c., &c., the said second and third pleas ought to be expunged from the record."

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The Court held that, considering the circumstances and habits of the people in the country districts of this Colony, a statement that plaintiff "had slept during the night in one room with the wife of J. W. Hurter," was not libellous, and therefore that the only libellous matter charged in the declaration was that plaintiff had "had carnal connection with Hurter's wife."

That the plea must consequently be deemed to be intended as an answer to the whole action, and not as a plea in justification of part of the libellous matter, because the only part of the statement alleged to have been published by the defendant, the truth of which he offered to prove, was a statement which was not libellous or material to the action.

That the second and third pleas were not an answer to the action, and therefore sustained the exception taken to them, and ordered them to be expunged from the record with the costs of the exception.

Thereupon the plaintiff consented to the defendant being absolved from the instance with costs. It was understood that the plaintiff did this in consequence of being convinced that he could not prove that defendant had said more than that he, the plaintiff, had slept during the night in one room with Hurter's wife.

[Vide Ord. 7, 1843, § 9, as to present limits of protection against legal proceedings for things done in Church proceedings.]

Beck *vs.* Aldum and Harvey.

Verbal injury. Pleading. Plea of justification, insufficiency of.

In this action (originally brought in the Circuit Court of Albany and removed to the Supreme Court), the plaintiff claimed damages from the defendants for having published

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in a certain newspaper a false, scandalous, and defamatory libel of and concerning him. The libellous words set forth in the summons were: "We sincerely trust our Magistrate will for the future act with more caution as to taking Mr. Beck's (thereby meaning the plaintiff's) oath;" and again, farther, "We sincerely trust that this will be a warning to all such persons (thereby meaning the said plaintiff), who appear not to know the value of an oath or the virtue of possessing a character."

The summons then proceeded as follows: "The said defendants by publishing the said false, scandalous, malicious, and defamatory libel thereby meaning that the said plaintiff, in giving his evidence before the Court of the Resident Magistrate of Albany, &c., &c., had wilfully and falsely stated that which was untrue, and, further, that he was a person not to be believed on his oath, or whose oath ought to be received with caution, or that he did not know the value of an oath, or the virtue of possessing a character."

To this summons the defendants put in a plea denying all and every the allegations set forth therein, and joining issue with the plaintiff thereon, and also the following special plea: "And as and for matter of special plea to the said summons, the said defendants say that the said plaintiff, on or about the present month of March, in giving his evidence before the Court of the Resident Magistrate for the district of Albany, &c., &c., stated on oath, that a certain placard alluded to, &c., &c., was the handwriting of one James Stone. Whereas, in truth and in fact, the said placard, &c., &c., was not in the handwriting of the said James Stone, which the said defendants are ready and willing to verify. Wherefore they pray that this case may be dismissed with costs."

The plaintiff, in his replication, as to the plea first pleaded by defendants, and wherein they have joined issue, doth the like. "And as to the matter of special plea by the defendants secondly pleaded, the plaintiff demurs and excepts to the same, as being altogether informal, uncertain, and insufficient in law, and not amounting to any legal answer, excuse, defence, or justification of the cause of action, &c., &c."

Ebden, for plaintiff, in support of the exception quoted *Starkie on Libel, vol.* 2, *p.* 100, 401; *Janzen* vs. *Stewart, Petersdorff's Abridgment, vol.* 12, *p.* 201.

Cloete, contra, quoted 171*st Rule of Court.*

The Court sustained the exception taken to the said special plea, with costs. They held that this plea could only be considered a plea in justification, and that the facts therein pleaded by defendants did not amount to a justifi-

cation of the libellous words as alleged in plaintiff's summons, inasmuch as the plea did not allege that the plaintiff, when he swore that the placard was in the handwriting of Stone, did so wilfully and with the knowledge or belief that it was not in the handwriting of the said Stone.

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KEYTER *vs.* LE ROUX.

Verbal injury. Dutch Reformed Church case. Privileged communication under Church Regulations, what is not. Costs between attorney and client. Dutch Reformed Church Regulations, Nos. 20, 22, *and* 50. *Reasonable and probable cause.*

In answer to a defamatory letter addressed by defendant to the minister and churchwardens of the Dutch Reformed Church at Caledon, recommending them not to re-appoint the plaintiff elder, it was pleaded that it was a privileged communication under the regulations of the Dutch Church. The Court held it to be a malicious communication, made without reasonable and probable cause, and therefore not privileged. Where the communication is of such a nature as to make it privileged, the communicating party is not bound absolutely to prove the truth of the communication. It is sufficient if he can show just and reasonable grounds for his belief.

1841. Feb. 23. — Keyter vs. Le Roux.

This was an action in which plaintiff sought to recover £250 as damages from defendant for having falsely and maliciously composed and published the following letter of and concerning the plaintiff, the matter contained in which was alleged to be false, scandalous, malicious, and libellous:

"Herveltjes Kraal, 19th Dec., 1839.

"The undersigned declares that in the former memorial of the 29th Nov. it is stated that he (the defendant) had been informed that at the nomination of Mr. Keyter (the plaintiff) as elder, some injustice (valsheid) had taken place among the churchwardens, but not a public injustice was meant, among all the churchwardens, but that a mistake had been made, so that the lot did not fall on him (the plaintiff). Not only this, but that the said Mr. Keyter wishes unjustly (unrighteously, met onregt) to draw towards him (the plaintiff) so many money matters (or affairs) of poor persons and of orphans, which will be further showed (or demonstrated) to him (the plaintiff), as in the estate of

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the late Mr. Van der Merwe twice successively wanted to benefit, instead of gaining, loses it before the Court. Not only this, but A. Theunissen also declares that Mr. Keyter has released his saddle-horse from the pound and sold it for his, Keyter's, profit. The undersigned can likewise declare that their vendue notes were paid to the said gentleman (meaning the plaintiff) four or five years ago, but which he (the plaintiff) afterwards wanted to collect again. Lastly, he (the plaintiff) injures the Government in purchasing tenders. The minister and churchwardens are therefore respectfully requested that the said Keyter may not be appointed as elder over our community. I hope your reverence and the churchwardens will comply with this my request.

"I have the honour to be,

"Your obedient Servant,

"J. S. LE ROEX.

"To the Minister and Churchwardens
of Caledon."

Defendant pleaded, first, the general issue; secondly, that at the time of composing and publishing the said supposed libel the defendant was a member of the Dutch Reformed Church at Caledon, and as such had notice that the minister and churchwardens thereof had, as far as in them lay, chosen the plaintiff as a fit and proper person to be appointed as an elder of said church, and that thereupon defendant did address and cause to be delivered to the said minister and churchwardens the said letter, which is the supposed libel, which minister and churchwardens were parties to whom the grounds and reasons of objection to the appointment of said plaintiff as elder might fitly and properly be made. And further that the said letter and the charges stated and alluded to therein were so respectively published and brought forward by defendant as such member of the said church, believing the same to be true, and without malice, and were laid before the said minister and churchwardens in order that plaintiff might not be recommended or proposed by them as a fit and proper person to be such elder, as it was lawful for the said defendant to do for the cause aforesaid, which is the same composing and publishing of the said proposed libel as in the said declaration mentioned.

Plaintiff replied that the said letter in the said plea mentioned, which the defendant is therein stated to have

addressed and caused to be delivered to the minister and churchwardens of Caledon, was not a privileged communication,—that the same was not dictated by a pure and conscientious motive, but was composed and published by defendant under the influence of a malignant feeling, and was and is a false, scandalous, and malicious libel, composed, &c., &c., as in the declaration alleged.

It was proved that at the election for two elders of the church at Caledon, after the votes had been taken by ballot, it was supposed by the minister and those present that Pietersen, Tesselaar, and plaintiff had the most votes, and that the votes in favour of the three were equal, and that De Wet, the defendant's brother-in-law, had fewer votes than they. That the minister thereupon first gave his casting vote in favour of Pietersen, and secondly in favour of plaintiff, as between him and Tesselaar. That subsequently it was discovered that a mistake had been made in counting the votes, and that Tesselaar had had a majority of one over Keyter. This was notified to the Presbytery, and at the next meeting of the vestry, at which all the electors were present, Tesselaar declined accepting the office, and on this the meeting unanimously, without a ballot, declared that plaintiff, who had had the next greatest number of votes, was elected.

Notice of this meeting had previously been given from the pulpit.

On the 29th November, 1839, defendant wrote to the minister and churchwardens the following letter:

"As the undersigned has recently been informed that at the nomination of Mr. Keyter, as elder, some (valsheid) injustice (or deceitful trick) took place among the churchwardens, and that the lot did not fall on the said Mr. Keyter, your reverences are therefore kindly requested not to appoint the said gentleman as elder over our community as in that case the undersigned will not submit to it. Trusting that the churchwardens will comply with my request,

"I am, &c.,

"J. LE ROEX."

The churchwardens, on the 9th December, wrote in reply a letter to defendant giving him notice to appear before them on the 14th December, on which day defendant did not appear.

The plaintiff resolved to give defendant "a respite of eight days, in order to recall his offensive expressions

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(valsheid) contained in his letter of 29th Nov., against the vestry, and that in case the vestry should not receive a favourable answer within that time, they will be obliged to take legal steps against him."

This resolution was communicated to the defendant, who thereupon wrote to the minister and churchwardens the alleged libellous letter, dated 19th December, 1839. In reply so which they caused the sexton to write to defendant as follows:

"22nd Dec., 1839.

"The churchwardens acknowledge receipt of your letter, and have fixed on Friday, the 3rd January, to take the same into consideration, and in the meantime the churchwardens request that you will take care on that day to send in the evidence of sworn witnesses in confirmation of the accusation brought against Mr. Keyter."

On the 22nd January, 1840, defendant wrote to the churchwardens a letter acknowledging the receipt of the preceding, and adding, "I therefore take this opportunity of informing you and the late churchwardens, of whom Mr. J. P. Maree is one, and who is convinced of his (plaintiff's) dealings with regard to the buying in (inkoopen) of tenders, besides other matters,—that it will be your duty to take the necessary information respecting that case, as Mr. Keyter has been unduly nominated as elder.

"In the second place, I must inform you that I shall not retract what I stated in my last letter. Judge yourselves whether it is right, according to our form by which elders are confirmed in their office (St. John, 10 c.; 1st Cor., 5 c.; 1st Tim., 3 c.), that a man who conducts himself in that manner should hold an office of elder, and I now positively request that you will not appoint Mr. Keyter as elder, for I am decidedly against it, and if his appointment takes place, I shall address myself farther with the documents now in my possession, and those which may hereafter be transmitted by you to me. I trust that you will not lose sight of my letter, and that you will comply therewith.

"J. LE ROEX."

By direction of the churchwardens, their secretary wrote the following letter to defendant:

3rd Jan., 1840.

"SIR,—I have been directed by the vestry to inform you, in answer to your letter of the 2nd instant, that having read and taken the same into consideration, they cannot in

any way meddle with the case in question respecting Mr. Keyter, and consequently leave it to your option to proceed therein as you shall deem fit.

"J. D. THEUNISSEN, Sec."

After the 19th December, 1839, the Governor refused to confirm, and annulled the election of Messrs. Pietersen and Keyter, on the ground that the usual form of publishing their names to the congregation before their election was reported to the Governor not to have been complied with.

Some time previously to the 3rd April, 1840, the secretary of the Presbytery wrote to the churchwardens, transmitting them a copy of the same charges against plaintiff which defendant had made, as above set forth to the churchwardens, and intimating the opinion of the Presbytery that they formed a proper subject for the investigation of the vestry.

On the 3rd April, 1840, a meeting was duly held for the election of elders, in consequence of Messrs. Pietersen and Keyter's election not having been confirmed by the Governor. At this meeting, the minister advised the vestry that in consequence of the formal and official manner in which the charges had been made to the Presbytery, Mr. Keyter should not be elected elder until they had been investigated, and in consequence he was not even proposed as a candidate.

Thereafter the churchwardens wrote to both defendant and plaintiff, calling on them to attend a special meeting to be held for considering the document which had been transmitted by the secretary to the Presbytery relative to the case between defendant and plaintiff, and defendant and churchwardens, in order that defendant might have an opportunity of proving his allegation against plaintiff (he having refused to attend a former meeting), and plaintiff of making his defence, in order to enable the churchwardens to give a decision thereon.

This meeting was held on 3rd July, when the following resolution and minute was made:

"The churchwardens, having taken into consideration all the documents brought against Mr. Keyter, and Mr. le Roex for the second time not having appeared, and Mr. Keyter having appeared, so defended himself from the charges brought on against him by Le Roex as completely to convince the consistory that they are frivolous and vexatious."

(On the 3rd July, 1840, the summons in this case was taken out.)

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Plaintiff had served as a deacon in 1828, 1830, 1831, 1832, and 1834, and as an elder in 1837 and 1838, and he was elected an elder at the annual election in October, 1840.

In defence, the defendant called Andreas Alexander Schonnberg.—I am a member of the Church at Caledon. I was co-executor with Van der Merwe of the estate of Du Toit. Plaintiff as vendue-master sold the estate. The price was to be paid at three instalments. When the first was payable plaintiff paid it to Van der Merwe in my presence with money which he brought out of his room, and gave it to Van der Merwe in a lump, on which Van der Merwe went out with the money. After he had calculated and counted it he came in and mentioned that he thought there was a mistake, and that more than he had paid was due. Plaintiff then took the vendue roll and calculated it over, and said that there was a mistake, and paid Van der Merwe the amount, which, in so far as I recollect, was between 1,600 and 1,700 Rds. Van der Merwe and I can write and reckon and Van der Merwe is a man of business. This was before we had given plaintiff any receipt. I don't recollect whether the payment was to be made on account of the first instalment of the movable property, or of the price of the movable, or of both together. I think the mistake arose from a miscalculation. The vendue clerk was present. This was in 1833. There was a mistake also of about £20 in the payment of the third instalment in 1834. Van der Merwe and I went to plaintiff's for it. Before he paid us he told us the amount which he was to pay, and gave us the money. We counted it, and found that we had the sum he said he had to pay us. When we got home to Van der Merwe's we counted it again and found that we had the same amount we had counted at plaintiff's, and then Van der Merwe locked it up in his desk. Some days after we began to divide the estate among the heirs. We had the amount of the first and second instalments, and we discovered that there was £20 deficient in the last instalment. We went back to plaintiff and told him this. He said "How is this possible; but however it is, I will pay you the £20. Go home and calculate again, and see if it is not a mistake on your part; if it is so, I hope you will repay me the £20; if it is not, then don't say anything about it." Plaintiff afterwards brought an action against me and the executor of Van der Merwe for the recovery of this £20, alleging that he had overpaid this amount. This action was decided against him. If there was an error, it arose from a miscalculation of the amount made by plaintiff. I heard that there were some unfavourable reports against plaintiff in respect of these transactions. The report was

only that he had made a mistake as to the payment of the instalments. I heard those reports from four or five persons. The report which I heard from those persons was that it was not good for Mr. Keyter, but that they did not know whether it was a mistake or not. I can't name any of those persons except Van der Merwe's brother Henry, to whom Van der Merwe had mentioned it. I told Henry I did not know whether the miscalculation was intentional or not.

Hendrick F. Van der Merwe.—I am the brother of the deceased executor of Du Toit's estate. I heard no reports about the conduct of plaintiff with respect to his payment to the executors, except from my said brother. I never mentioned what he told me to any person. After his death, when Keyter brought the action against me, as my brother's executor, and Schonnberg, for repayment of the £20, I made inquiry from several persons about the matter.

Josias David de Kock.—I am field-cornet and a member of the Church at Caledon. I heard long ago certain reports or rumours unfavourable to plaintiff as to his conduct about Du Toit's estate from several persons. I only recollect the name of one, Naudé. I also heard from Andreas Theunissen something that had occurred with plaintiff about a horse. I never mentioned to any one what Theunissen told me. On the 1st March, 1839, I heard one Maree say that plaintiff had purchased a tender,

Andreas Theunissen.—I live at Matjes Drift (within two miles of plaintiff's). About twelve years ago I lost a horse at Palmiet River (about thirty miles distant). I saw him about three months afterwards in the possession of Adam, formerly a slave. I allowed him to keep the horse, as I knew Mr. Keyter would pay me the value. I afterwards got from plaintiff 50 Rds. for the horse, which was what I had paid for him; he had sold it to Adam for 35. He paid me the 15 Rds. out of his own pocket. Plaintiff told me he would rather take my word than that of his slave, and that if I could swear that the horse was mine he could not swear that it was his, but that his servant had told him it was one of his. I told this matter about the horse to H. de Wet, in defendant's hearing. I never told defendant or any one that I thought plaintiff had sold my horse knowing it to be mine. I never believed this.

Christian Christoffel Muller.—I heard a general report, both at Worcester and Caledon, from four or five persons, and in several years, that plaintiff sometimes received the amount of vendue notes due to him, and gave receipts for them when he was from home, or could not find the notes to give them up to the payer, and afterwards, after the lapse

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of several years, demanded and obtained payment of them a second time. I heard De Wet, the defendant's father-in-law, say that he had in this way twice paid a vendue note for 89 Rds. and another for 31 Rds. I heard the same report from Ruth, who is here as a witness.

Hendrik de Wet.—I am defendant's father-in-law. I have heard rumours from several persons that the plaintiff received money for vendue notes due to him, but instead of giving up the notes at the time gave receipts for the amount, promising afterwards to give up the notes, and that after the lapse of time he writes again, demanding payment of them. Plaintiff had formerly a good deal of business as an auctioneer. I told defendant that plaintiff had demanded from me a second time payment of a note of 89 Rds., which I had formerly paid him. This was not long before defendant wrote the letter of 19th December, 1839. I have heard from Marais, and also in loose conversation with others, that plaintiff purchased tenders.

Peter Ruth.—I have mentioned to a few, not many persons —I can't say how many—that plaintiff had asked me a second time for payment of vendue notes which I had already paid. I did not mention this to defendant.

Defendant closed his case.

Plaintiff, in replication, called.

Absalon.—I was a slave of plaintiff. I recollect his losing a horse, after which I was sent to the pound to release two mares of his. I then saw in the pound the horse which plaintiff had lost. I told this to plaintiff, and by his order I went and released the horse—which was about two years old—from the pound. About a month afterwards it was sold to Adam, and afterwards claimed by Theunissen. I knew the horse well; I thought he was my master's when I reported the matter to him, and I think so still.

Ryno Johannes van der Riet.—Since January, 1840, to the present date, I have acted as plaintiff's agent in the collection of vendue notes. He gave me a pack of notes—about two or three hundred, in amount about £400 or £500. He told me that very probably there were some of them paid, and that when any of the debtors in the notes produced either his or Mrs. Keyter's receipts, I was to give up the notes, without charging any interest which might have accrued before the time when by the receipts it appeared the capital had been paid. I think about four or five receipts of Mrs. Keyter were produced to me.

Plaintiff closed his case in replication.

Musgrave, for plaintiff, quoted the 20th, 22nd, and 50th Regulations of the Dutch Reformed Church, and maintained

that under the 20th section defendant was only entitled to prove his objections to the competency and fitness of persons elected as elders to hold that office, and that if he failed in the proof, he must be held to have made the objection at his own peril, and what he has alleged and fails to prove ceases to be a privileged communication. He also quoted *Starkie, vol.* 2, *p.* 461, 462, 464, 494, and then contended that the evidence proved that defendant was actuated by a malicious intention. (*Voet*, 47, 10, § 9.)

Attorney-General argued *contra*, and quoted Article 82 of the Church Regulations. (*Lee's Nisi Prius, p.* 1,363; *Harrison's Digest, p.* 918—*Blackburn* vs. *Blackburn.*) He maintained that defendant had probable or just and reasonable cause for the statements he had made.

The plaintiff did not ask for vindictive damages.

The Court gave judgment for plaintiff. Damages, £20, with full costs, taxed as between attorney and client on the following grounds:

The Court held that if defendant, as a member of the Church at Caledon, had stated to the vestry, as an objection to plaintiff's election as elder being confirmed, that Schonnberg and Van der Merwe had stated that plaintiff had made two mistakes in paying the amount of sales due by him to Du Toit's estate; and that Theunissen had said that plaintiff had released his (Theunissen's) horse from the pound, sold it to Adam, and received the price from Adam; and that certain individuals had said that plaintiff had received payment of some vendue notes, and had some years afterwards demanded payment of them again; and that as these matters were publicly talked about, he objected to plaintiff's election being confirmed until some investigation should be made to ascertain whether the short payments to Du Toit's executors were made by mistake or intentionally, with design to defraud; and whether plaintiff believed that the horse which he had released from the pound and sold to Adam was his own, or had done so knowing the horse belonged to another; and whether, when plaintiff demanded a second time payment of the vendue notes, he believed they were unpaid, or knew that they had been paid before,—the defendant would have been privileged in stating those grounds of objection, provided he could prove that such statements had actually been made by the persons above mentioned, or that he had reasonable and probable cause for believing that they had done so. And, therefore, as the evidence in this case proved that such statements had been so made by those persons respectively, he would in the case above supposed have established a good defence against this action. But this case, as it has

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been proved, is very different from that which has just been supposed, for the Court are of opinion that the alleged libellous letter of 19th December, 1839, on a fair construction of it considered by itself, and still more so when explained by what must be taken into consideration, the defendant's letter of the 23rd December, 1839, with its reference to 1st Corinthians, cap. 5, must be held to have been intended, and to have had the effect, to charge plaintiff with having fraudulently and unjustly endeavoured to pay to Du Toit's executors less than he owed him; to convert Theunissen's horse to his own use, knowing that it was not his own horse; and to have demanded payment of the vendue notes a second time, knowing that they had previously been paid. It is impossible to come to the conclusion that defendant intended to charge the plaintiff with having merely done those things without a fraudulent and dishonest intention, for in that case, as the defendant must have well known, his having so done them would not have furnished any valid objection to his election as elder. Further, the letter of the 19th December contains a very distinct and strong charge against the plaintiff of unjust and dishonest conduct to the poor and the orphans: "Not only this, but that the said A. P. Keyter wishes with injustice to draw to himself so many money matters of poor persons and orphans, which will be further showed (or proved or demonstrated) to him."

(The Court threw out of view altogether the statement as to injuring the Government by purchasing tenders, considering this imputation not actionable.) It is true that as the statement by a member of the church to the vestry of objections against the plaintiff's confirmation is in law a privileged communication, he will not be rendered liable in damages merely because he has been unable to prove the truth of the imputations against the plaintiff's honesty and integrity specified by him as the ground of these objections, or even because the plaintiff has (as the Court think, and the defendant's Counsel has admitted that he has done in this case) proved that these imputations were untrue and without foundation, provided that the defendant can satisfy the Court that at the time he stated the objections to the vestry he had probable, that is, just and reasonable cause for believing, and did actually and *bonâ fide* believe that the facts imputed by him to plaintiff were true. And provided the plaintiff shall not satisfy the Court, as a jury, from the terms of the alleged libel itself, and from the evidence which has been given, that the defendant, in making those imputations, was actuated by malice, and not solely by a conscientious desire and intention to dis-

charge his duty and exercise his right, as a member of the Church, to prevent the election of any unfit person as an elder.

The Court are of opinion that the defendant has entirely failed to produce any evidence to show that he had any just and reasonable cause for believing that plaintiff, unjustly and dishonestly, and with an intent to defraud, had made the short payments to Du Toit's executors, had sold Theunissen's horse, or had demanded a second time payment of vendue notes which had already been paid, or that plaintiff had wished with injustice to draw to himself so many money matters of poor persons and orphans.

The Court are further of opinion that, from the terms of the letter of the 19th December, 1839, and the circumstances which have been given in evidence, it has been proved that the defendant, in writing that letter to the vestry, was not actuated solely by a conscientious desire and intention to perform his duty, and exercise his rights as a member of the Church at Caledon as to the election of elders, but by a malicious desire and intention to prevent the plaintiff from holding the office of elder, and for this purpose to charge the plaintiff with acts of fraud and injustice which he knew had not been committed by him, or at least which he had no probable, *i.e.*, just and reasonable cause for believing had been committed by him; the want of a probable cause of belief being itself an ingredient from which to infer malice, and one which, taken in conjunction with the other facts of this case, leaves no doubt of the malicious intention of the defendant.

Bailey *vs.* Abercrombie and Chiappini.

Injury, literal. Privileged communication, what is not. Justification, plea of.

Where two medical men accused a third of conduct derogatory to the character of a gentleman and of a medical man: Held *to be libellous.*

Justification pleaded after a full apology destroys the effect thereof, and is a deliberate repetition of the libel.

This was an action for libel, brought against Drs. Abercrombie and Chiappini, by Dr. Bailey, on the following grounds, as formally set forth in the declaration: The plaintiff complains, for that whereas he is a good, honest, true, and faithful subject of the realm, and as such hath

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always behaved himself, and until the committing of the grievances hereinafter mentioned, was always reputed and esteemed to be a person of good name, fame, and credit. And whereas, also, the said plaintiff, before and at the time of committing of the grievances hereinafter mentioned, practised and exercised, and still continues to practise and exercise, the art, profession, and business of a surgeon and general medical practitioner, and in the course of such practice had deservedly obtained the good opinion, esteem, and confidence of all his acquaintances and patients. And whereas, also, the said plaintiff, whilst so practising his said art, profession, or business, and before the committing of the said grievances, to wit, on the 11th day of August, 1841, at Cape Town aforesaid, the said plaintiff, visited and attended in the way of his said art, profession, or business, the child of one Thomas Grimes, which then was sick;—yet the said defendants, well knowing the premises, but maliciously intending to injure the said plaintiff in his good name, fame, and credit, and in his aforesaid art, profession, or business, and to bring him to public scandal, infamy, and disgrace, and to cause it to be suspected and believed that the said plaintiff had been and was guilty of the misconduct hereinafter mentioned to have been imputed to him by the said defendants, falsely, wickedly, and maliciously did compose and publish, or cause to be composed and published, of and concerning the plaintiff, and of and concerning the plaintiff in his said art, profession, or business, as a surgeon and general medical practitioner, and of and concerning the said plaintiff's attendance upon and visiting the said child of the said Thomas Grimes, the following scandalous, malicious, and defamatory libel, that is to say,—that he, the said plaintiff, in taking charge of the said child of the said Thomas Grimes, had been "guilty of conduct derogatory to the character of a gentleman and a professional man." Whereby the said plaintiff hath been and is greatly injured in his said good name, fame, and credit, and brought into public scandal, infamy, and disgrace amongst all his neighbours, and other good and worthy subjects of the realm, and is also greatly injured in his said art, profession, or business as a surgeon and medical practitioner, to the damage of the said plaintiff of three hundred pounds, of lawful sterling money of the said Colony. And, therefore, he brings his suit and prays that the said defendants may be adjudged to pay him, the said plaintiff, the sum of three hundred pounds, with the costs of the said suit, or to make such other reparation to the said plaintiff for the injury he has sustained as this honourable Court shall deem fit and adequate in the premises.

The defendants pleaded not guilty to the alleged grievances laid to their charge, and denied all the above allegations, except as hereafter specially admitted, or confessed and avoided, and they severally tendered issue thereon. As a second plea, they, admitting, as they do admit, that they did severally compose the words in the said supposed libel set forth in the declaration, deny that the said words are libellous in law. And thirdly, as a further plea, they alleged that at the time of the grievances complained of, they were attending, as doctors of medicine, upon the child of Mr. Thomas Grimes in their medical and professional capacity; that while the said child was under their medical treatment, the plaintiff had prescribed and administered, or caused to be administered, certain medicines, knowing at the time that the patient was under their medical treatment and attendance, or the medical treatment and attendance of one or the other of them; and this without notifying to them, or either of them, the circumstances under which or the manner in which he thus acted, and without offering to consult or advise with them as to the nature or cause of the disease or the medical treatment to be observed. Wherefore they had composed and addressed to him the words set forth in the declaration and complained of, as it was lawful for them or either of them to do, which they were ready to verify.

In replication, as to the first plea of defendants, the plaintiff also joined issue. And he averred that he could neither be barred from his action by their second plea,—the words being libellous in law,—nor by their third plea, because, although he admitted the facts stated by them in that place to be true, they were not justified in composing and addressing to him the words complained of, which they had done of their own wrong, and without any lawful cause.

Musgrave and *Ebden*, for plaintiff, put in certain letters which had passed between the parties, one of which letters, signed by the defendants, contained the words founded on by plaintiff. In another letter, towards the end of the correspondence, defendants retracted the expressions unconditionally, expressed their regret, and agreed to settle any just costs incurred.

To prove publication, plaintiff called Dr. Laing, who deposed that the letters put in had been shown to him by Dr. Chiappini, in the presence of Dr, Abercrombie, at a meeting of the Medical Society, a private professional society, of which plaintiff had been a member, but from which he had previously withdrawn. Witness was not himself then a member of the Society, but attended at the request of defendants and of Dr. Leisching.

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Grimes and his wife were called and examined at length, but their evidence was immaterial to any of the questions of law arising in the case. Plaintiff closed his case.

Defendants called Dr. Leisching, President of the Government Medical Committee, senior member and founder of the Medical Society spoken of by Dr. Laing, which, he deposed, was a friendly association of medical men, to discuss medical subjects and to observe medical etiquette amongst themselves, and one of the rules of which Society was, that when a dispute arose between two medical men, they should get two friends to settle it, and in the event of their failing to adjust the matter, it should be referred to the Society, whose decision should be final. Dr. Bailey had withdrawn from the Society. Two meetings were called by Dr. Chiappini, at his house, when the letters were put in, Dr. Abercrombie adding that the communication was *inter medicos* and strictly confidential. A letter was then written to Dr. Bailey, stating that the case had been laid before the Society, and asking if he would submit to an explanation to it, which he declined to do. Defendants also called other medical gentlemen, but their evidence was immaterial to the questions of law in the case.

Musgrave, for plaintiff, quoted *Holt*, 220, 279, 280; *Van der Linden, p.* 210; *Medico-Chirurgical Review, No.* 63; *Starkie on Libel, vol. I, p.* 148.

Cloete argued that the words alleged to be libellous were not in themselves libellous. (*Starkie on Libel, vol. I, p.* 117 *et seq.; Harrison's Digest, p.* 917.) 2ndly. He maintained that the only publication was that made in the Medical Society, and that this must be held to be a privileged communication. (*Starkie, vol. I, p.* 15.) 3rdly. That the statement made in plaintiff's reply to defendants' first letter,—that it was only on Thursday, the day after he had attended young Grimes, that he first learnt that Dr. Abercrombie had been in attendance, and which the evidence had proved to be untrue,—was a sufficient provocation to enable them to write as they had done.

The Court unanimously held that a publication of the alleged libel to the members of the Medical Society on the 18th August was proved, and that it was not a privileged publication. That the letter contained a libel against plaintiff. That the facts proved in justification did not amount to a justification, and were not sufficient even to prove that plaintiff had violated any established rule of medical etiquette. That none of the apologies except the last was such as the plaintiff was entitled to demand. And that whatever might have been the effect of this last retractation in lessening the damages, if no justification

had been attempted to be set up, the justification pleaded destroyed the whole effect of this retractation, and was a deliberate repetition of the libel.

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The Court, therefore, gave judgment for plaintiff—damages £50 and costs, against defendants jointly and generally.

In giving judgment, MENZIES, J., expressly reserved the point whether the sending of the libellous letter to the plaintiff himself, without any other publication, was not, if it could be proved, sufficient to entitle him to claim damages from defendants, there being no necessity for deciding it, as publication to others was proved.

LEWISON, APPELLANT, *vs.* PHILIPS, RESPONDENT.

Caricature. Damages for.

Costs awarded between attorney and client.

1842. May 6. Lewison, Appellant, vs. Philips, Respondent.

The appellant in this case had sued the respondent in the Court of the Resident Magistrate of Cape Town for £20 as damages "sustained by him by reason of the said defendant having maliciously and mischievously held up the plaintiff as an object of public ridicule and contempt, by means of certain two sketches, drawings, or pictures, &c., both being caricature likenesses of the said plaintiff, executed and published by the defendant, and, moreover, exposed and sold at public auction on the 12th March last by C. W. Adams, auctioneer, by order of the said defendant."

After hearing the plaintiff's witnesses, the Resident Magistrate dismissed the case, and gave £1 17s. costs against plaintiff.

The appellant brought this judgment under review, as being contrary both to law and to fact.

The Court, after considering the evidence given by plaintiff's witnesses before the Resident Magistrate, and inspecting the two drawings or pictures, were of opinion that the pictures were merely caricatures of the plaintiff, and could have no effect prejudicial to his character or reputation, or any other effect than to hold him up to ridicule, and even not to a very great extent; but that it was proved that they had occasioned ridicule to the plaintiff, and that the defendant had published them for the express and avowed purpose of annoying the plaintiff and hurting his feelings. On these grounds they held that the plaintiff was entitled

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to claim pecuniary reparation from defendant for the injury done to his feelings, reversed the judgment of the Resident Magistrate, and gave judgment for plaintiff, damages £1, with costs, both in the Supreme and Resident Magistrate's Court, to be taxed as between client and attorney.

HAUPT, APPELLANT, *vs.* FINLAYSON, RESPONDENT.

Verbal injury by allegation of robbery. Reasonable grounds for suspicion of such robbery, when a defence.

1844. Dec. 12. Haupt, Appellant, vs. Finlayson, Respondent.

The respondent had sued the appellant in the Court of the Resident Magistrate of Port Elizabeth for £10 damages for an alleged libel. The plaint set forth that the appellant had, with one William Allen, falsely and maliciously spoken and published, of and concerning the respondent, the false words following: "That he suspected the respondent of having robbed his, appellant's, cash-box, and requested Allen to talk with respondent and try to pump the truth out of him; and that if respondent would acknowledge to have committed the robbery the appellant would forgive him."

After hearing the evidence adduced by both parties, the Resident Magistrate gave judgment for the plaintiff, for £10 damages, with costs.

Defendant entered an appeal.

After hearing the Counsel for the parties, the Court held that the evidence proved that £8 had been stolen from the appellant's cash-box under such circumstances as gave the appellant and his brother, who were, with the respondent, the only persons living in appellant's house, reasonable grounds for suspecting that the prisoner was the thief. More especially, as neither the counting-house, in which the cash-box was, nor the box itself, had any marks of having been entered or broken into by violence; and that respondent had admitted that, on the day when it appeared probable that the theft had been committed, he had, during appellant's absence from home, had access to the keys of the counting-house and cash-box, and had actually moved them from where appellant had left them to another place.

That these suspicions justified the appellant in investigating the matter for the purpose of discovering whether the respondent was the thief; that the communication of his suspicion to Allen, although not an officer of justice, in order that Allen might endeavour to find out from respondent

whether he had committed the theft, was an act which appellant might lawfully do in the course of that investigation—and that the evidence showed no proof of any malicious intention, on the part of the appellant, to injure the respondent, but, on the contrary, that in what he did he was actuated solely by a desire to endeavour to recover his property and discover the thief.

That such publication of his suspicions was therefore a privileged publication, which, in the absence of all proof of *animus injuriandi*, must be deemed to have been made *sine animo injuriandi*, and therefore did not render it necessary for the appellant to prove the *veritas convitii* in order to free him from respondent's claim for damages. (*Vide Fowler & White* vs. *Horner*, 3 *Campbell, p.* 294; *Stephen's Nisi Prius Cases*, 2, 565.)

The Court therefore reversed the judgment of the Resident Magistrate; and condemned the respondent to pay appellant's costs in both Courts. (*Vide Panter* vs. *O'Driscoll, post.*)

HAUPT *vs.* ELSTER.

Verbal injury. Variance.

Where the libel averred of the plaintiff was "he has made a false oath," and the words proved were "he must have made a false oath," held a fatal variance. The words "he must have made a false oath" are not actionable without extrinsic proof that they were used animo injuriandi.

The plaintiff's declaration in this case set forth that the defendant, intending to injure the fair fame and character of the plaintiff, did, on the 5th June, 1845, while speaking to D. E. Haupt, a brother of the plaintiff, and to several other persons, of and concerning the plaintiff, and referring to a certain affidavit which the plaintiff had made on oath regarding the price agreed on between him, the plaintiff, and the defendant for the freight of certain goods shipped by the plaintiff on board a vessel called the *Camden*, speak and utter the following false, scandalous, malicious, libellous words, of and concerning the plaintiff, to wit, "Then your brother (meaning the plaintiff) has made a false oath." Wherefore the plaintiff claimed £250 damages and costs.

The defendant pleaded the general issue.

The plaintiff called

1845. Dec. 9. — Haupt vs. Elster.

Jacobus W. C. Gie.—I came a passenger in the *Camden* from Algoa Bay, from which we sailed on the 25th or 26th of May last. Defendant was also a passenger. I had a conversation with him while on board. Defendant said that ptaintiff had shipped oats in the *Camden*, and that plaintiff wished to dispute the freight, saying that he, defendant, had agreed for freight to ship four hogsheads as a ton, but that it was not the case, as he, defendant, had agreed that the oats should be shipped according to measurement. After we landed in Cape Town I met defendant at plaintiff's brother's, at a store in Plein-street. Defendant asked plaintiff's brother if he had received his oats. He answered, "Not yet. I have been at Mr. Norden's about it, and he refers me to you; and I have also received an affidavit from my brother stating that he had shipped according to agreement, four hogsheads to a ton." Defendant replied, "Well, if he has done so, he must have taken a false oath." That was all that passed. Defendant did not say he had seen the affidavit; he spoke as if he had not seen it. Plaintiff's brother did not show defendant plaintiff's affidavit.

Daniel E. Haupt.—I am plaintiff's brother. I know the handwriting of Mr. Fleming, Justice of the Peace at Port Elizabeth. The signature now shown me is Mr. Fleming's. The writing is an affidavit plaintiff made before Mr. F. I got it by post from Port Elizabeth, from the plaintiff. [Plaintiff put in the affidavit, which was read, and in which, *inter alia*, the plaintiff stated that the agreement had been made between him and defendant at the rate of four hogsheads to the ton, but that defendant had afterwards, and before the grain was shipped, denied this, and insisted on charging the freight by measurement.] After defendant came here in the *Camden* I had a conversation with him, in presence of last witness, on the 5th of June last. Defendant came up while I was on my stoep; I asked him how it was with regard to the freight of the oats. He said he had nothing to do with it; I must go to Mr. Norden. I said I had seen Norden, who referred me to him, and that he had better arrange with me in regard to the freight, as I wished to know what I had to pay. He said it was stated on the back of the bill of lading. I said that was not according to the agreement. He said it was, and I had better pay it. I said I could not do it, as my brother had written to me he had agreed to pay for four hogsheads to a ton, and not by measurement. Defendant said the charge was according to agreement. I said it could not be so, as I had received an affidavit to the contrary. He said, "Then your brother has made a false oath." I was about showing him the affidavit, and he went off the stoep, saying,

"If you don't pay the freight I won't let you have the goods."

Cross-examined.—I heard Mr. Gie examined to-day. He must be wrong in the account he gave of the words, as he has said they were "He *must have* taken a false oath." For I swear the words were "Then he has *sworn* a false oath." I told Mr. Gie at the time, accounting for the words used by Mr. Elster, that I attributed the words he had used to his not being versed in the English language. The affidavit was then in the store.

The plaintiff closed his case.

The defendant called no witnesses.

Ebden, for plaintiff, maintained that the words proved to have been uttered by the defendant were actionable.

The *Attorney-General, contra*, maintained the contrary; and also that there was a variance between the words positively alleged in the declaration and the words as sworn by Mr. Gie, who was a better witness than D. Haupt, which were,—"then he *must have*," and not "*he has*," as alleged in the declaration. Also that there was no positive proof of *animus injuriandi*. And quoted *Stephen's Nisi Prius, vol.* 3, *p.* 2573; and maintained that the conversation between defendant and D. Haupt was a privileged communication, defendant being agent for the ship and D. Haupt the agent of the plaintiff, and the subject being a dispute between them in that capacity, in which the defendant was entitled and privileged to impugn the evidence founded on by his opponent, unless what defendant said was proved to have been said by him maliciously, because under these circumstances malice was not by law to be inferred from the words themselves. And quoted *Voet*, 47, 10, 20, "*Quod si litigator*," *&c.*

The Court unanimously gave judgment for the defendant, with costs.

The Court held, 1st,—That if it had been proved that the words used by defendant were "must have made" and not "has made," this would have been a material and consequentially fatal variance from the words "has made," which were positively averred in the declaration. 2ndly,—That without imputing any intention on the part of plaintiff's brother wilfully to give an untrue statement as to the words used, still it was impossible to hold merely on his evidence, contradicted as it was by the evidence given by Gie, that the words used were "has made," and consequently that the plaintiff had failed to prove the utterance of the words alleged in his declaration. 3rdly,—That the words "Then he must have made a false oath" were not of themselves actionable without extrinsic proof that they had been

1845. Dec. 9. — Haupt vs. Elster.

used *animo injuriandi*. 4thly,—That the utterance even of the words "Then he has made or sworn a false oath" would not, under the circumstances which had been proved in this case, necessarily imply that the defendant meant to impute to plaintiff that he, plaintiff, had wilfully sworn that which, at the time he swore, he knew to be false. 5thly,—That there was a question in dispute between the defendant, in his capacity as agent for the vessel, and the plaintiff's brother, as agent for the shipper, about the amount of freight due for the grain shipped by plaintiff, and that it was lawful for the defendant in that capacity, and in defending the interest of the shipowners, without thereby subjecting himself to damages, to impugn the truth of the evidence given by the plaintiff or any other hostile witness on that subject, provided it was not shown that he did so *animo injuriandi* the person whose evidence he impugned; and that, so far from any such *animus injuriandi* having been proved by the plaintiff against the defendant, the circumstances which had been proved led to the conclusion that the defendant from the beginning was under the conviction that no such agreement as that alleged by the planitiff had ever been entered into by him.—(*Vide Norden* vs. *Oppenheim, post.*)

Norden *vs.* Oppenheim.

Verbal injury. Probable cause. Privilege of Witness. Pleading. Onus probandi. Form of action.

In an action for slander for words used by the defendant when under examination in a criminal case, the onus probandi is on the plaintiff to show the mala fides and malice of the witness, and the falsehood of the statement and the absence of reasonable cause for belief in their truth.

A witness is so far privileged by the law of this Colony as to statements made by him while under examination on oath, but it is presumed in law in his favour that such statements were true, or that he had probable cause for believing them to be true, and that in making them he has not been actuated by malice. The onus probandi the opposite lies on the other side.

The proper form of action against such witness is an action for damages, and not for verbal injury.

1846. June 29. July 13. Dec. 8. — Norden vs. Oppenheim.

The declaration in this case set forth, in substance, that at the time of the committing of the grievances thereinafter mentioned, one Levi Heinemann was under trial in

the Supreme Court before one of the Judges thereof; and whereas it was a question in the said trial by whom a certain writing, produced and shown to certain of the witnesses, had been written or prepared; and whereas the circumstances of the case, and the nature of the said writing, were such, that if the same had been written, or prepared, or concocted by the plaintiff, the said plaintiff would have thereby been guilty of gross and malicious fraud, falsification, or fabrication, yet the defendant, contriving and intending to injure the plaintiff in his good name, &c., &c., and to cause it to be believed that the plaintiff had forged, or falsified, or fabricated, or concocted, or connived at the concoction of documents, on or about the 5th May, 1846, and in the Supreme Court, he, the defendant, being then and there under examination as a witness on the said trial, in the presence and hearing of the said Judge, and of the jury impannelled to try the said case, and of numerous bystanders, not in the fair, reasonable, or *bonâ fide* performance or exercise of any duty or obligation incumbent upon him as such witness, but maliciously, wantonly, and unnecessarily, in answer to certain questions then and there put to the defendant by the said Judge, answered, spoke, and published of and concerning the plaintiff, the false, scandalous, and malicious, and defamatory words following; that is to say (here the declaration set forth in their proper order, and with the necessary inuendoes, the following question and answer):

Question.—Do you mean that this paper was written by Mr. Norden?

Answer.—I cannot say if it is in his handwriting, but I say it was concocted by Mr. Benjamin Norden. He was constantly with Mr. Heinemann. And what makes me think so is, that two years ago Mr. Benjamin Norden did a similar thing with another party by which I was robbed. I was robbed of £40. (Meaning that the plaintiff had on a former occasion concocted some false paper or papers, or done some similar fraudulent act, by means of which the defendant had been wrongfully and unlawfully robbed to the amount of £40; and which words, if they had been spoken and published by the defendant of and concerning the plaintiff, otherwise and elsewhere than by the defendant in the course of his examination as a witness, and in answer to questions then put to him as a witness, would, unless they had been proved to have been true, under a plea of justification, have been highly slanderous, and rendered the defendant liable in damages to the plaintiff). By means of the committing of which said grievances by the defendant,

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the plaintiff was greatly injured in his good name, &c., &c., and hath sustained damage to the amount of £500. Wherefore he prayed, &c., &c.

The defendant pleaded the general issue.

Plaintiff called

William Buchanan, editor of the *Cape Town Mail*, who proved that he had been present at the trial of Heinemann, and had there taken down the evidence and proceedings in short-hand, of which he produced a printed report made by him from his short-hand notes; and that the following extract from it of part of the cross-examination of defendant contained a true and correct statement of the questions which had been put to him by the Counsel and Judge, and of the answers which he had made thereto:

Mr. Ebden.—In whose handwriting is that memorandum of his assets? (marked W.)—I do not know.

Mr. Ebden.—Is it not in Canstatt's handwriting?—No.

Mr. Ebden.—Is it in Hart's?—I no not know Hart's handwriting.

Mr. Ebden.—You have seen it before?—I solemnly swear I never saw it before now.

Mr. Ebden.—It professes to be a memorandum of Mr. Heinemann's assets. Cast your eye over it and say whether it is not a true statement of Heinemann's assets?—(No answer.)

Mr. Ebden.—You see, my Lord, we say this is a correct account given to Oppenheim by Heinemann immediately after his arrival.

Justice Menzies.—You say that in the evening of the 17th, at the time the notes and cash were paid by Heinemann, a memorandum of his funds was made out in Canstatt's handwriting. Do you know what became of that paper?—Mr. Canstatt got it.

Justice Menzies.—Was that the first time you had heard Heinemann give an account of his funds?—Yes, never before. I positively believe that this paper was made out afterwards by some party——

Justice Menzies.—By whom do you believe?—I believe it was Mr. Benjamin Norden, to get himself out, and to get others in; because it is not the first time I found out such a thing. I found it out last week.

Justice Menzies.—Do you mean that this paper was written by Mr. Norden?—I cannot say if it was in his handwriting, but I say it was concocted by Mr. Benjamin Norden. He was constantly with Mr. Heinemann, and what makes me think so is, that two years ago Mr. Benjamin Norden did a similar thing with another party by which I was robbed. I was robbed of £40. I positively say that two years ago——

Justice Menzies.—We cannot put Mr. Norden on his trial. If such was the case it was your duty two years ago to have applied to the Clerk of the Peace?—I did not know it till last week.

Mr. Ebden.—On what day did you send the notes to be changed for gold?—It was the same day that I received the £200. I can prove it by Mr. Powrie, who was in my store. I was very angry when the boy came back and brought only £60.

Mr. Ebden.—Do you know who Peter is?—How can I know who Peter is?

Justice Menzies.—Peter who?

Mr. Ebden.—My Lord, there is a fictitious personage mentioned in the wife's letter under the name of "Peter." I believe, Mr. Oppenheim, you had an action brought against you in the Magistrate's Court for saying that Mr. Norden was Peter?—Yes, and I did not defend it, because Mr. Norden only brought his action for £20; and I thought if he only valued his character at that I had better pay it, and bring my action in the Supreme Court, which I have done. I thought he valued his character a little too high; but I paid him for it.

The defendant admitted that the writing or memorandum to which the said questions and answers referred had been written by one Hart.

The plaintiff closed his case.

Ebden, for the defendant, moved for an absolution from the instance, on the ground that what defendant had said on oath while under examination as a witness was privileged, and must be presumed and deemed to have been true, and to have been spoken without malice, if not absolutely, at least until its falsehood and actual malice on the part of the defendant was proved; and quoted *Starkie on the Law of Libel, pp.* 80, 239, 240, 242, 246, 247, 254; *Stephen's Nisi Prius, voce Slander*, 2565, 2283; *Hodgson* vs. *Scarlett*, 1*st Barn. and Alder. p.* 232, 243, *and the note thereto; Espinasse's Nisi Prius, voce Evidence, p.* 408 *et seq.; Dutch Consultations* (*Utrecht*), 2*nd vol., p.* 416.

The *Attorney-General* and *Brand* argued *contra*, and maintained that a malicious untruth given on oath in a court of justice is not a privileged communication. That the privilege of witnesses cannot be greater than the privilege of parties to a cause, or their advocates, and that both the latter are bound to prove probable cause, or show reasonable probability of the truth of what they say, when it is injurious to another. (*Stephen's Nisi Prius, p.* 2565; *Buckly* vs. *Wood*, 1 *Croke, p.* 248; *Voet*, 47, 10, 20; *Codex*, 4, 20, 1, 13.) That the mere fact that the defendant was

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under examination as a witness when he uttered the injurious words, although affording a presumption that they were not uttered *ex malitiâ*, is not *probatio probata* that there was no malice on the part of the defendant. And that malice was to be presumed in this case, from the defendant not having proved or alleged facts in justification.

Ebden, in reply, maintained that even if the law of the Colony did not go so far as the law of England did in refusing to allow actions for slander, under any circumstances, for words spoken by a witness on oath, and in answer to questions put to him while under examination, which he maintained it did, yet that at the very least it imposed on the plaintiff the *onus* of proving the malice of the defendant, and the falsehood of the allegations complained of, which in this case the plaintiff had totally failed to do.

Cur. adv. vult.

Postea (13th July, 1846).—The Court held that it was unnecessary to determine whether the law of this Colony went so far as the law of England was alleged to do, in altogether refusing actions of damages for words spoken by a witness on oath in answer to questions put to him while under examination; or, if it did not, what circumstances proved by the plaintiff were sufficient to relieve him from the *onus* of proving that the allegations complained of were false, or uttered without any probable cause for believing them to be true, and that the defendant was actuated by malice, and to impose on the defendant the *onus* of proving the contrary,—because it was clear that by the law of this Colony a witness was so far privileged as to statements made by him while under examination on oath, that it was presumed in law that such statements were true, or at least that he had probable cause for believing them to be true, and that in making them he had not been actuated by malice; until at least some evidence was brought by the plaintiff to rebut these presumptions of law in favour of the witness;—because in this case the plaintiff had not proved any circumstance whatever from which it could be inferred that the statements complained of had not been made by the defendant in the fair performance of his duty and obligation as a witness, and therefore were not privileged; and because the plaintiff had brought no evidence whatever to show that the defendant was actuated by malice, or that the statements were false; or to show, or even to afford ground for inference, that the defendant had not had reasonable cause, when he made them, for believing them to be true; nay,

further, had not even alleged in his declaration that the defendant had no reasonable cause for such belief,—and therefore absolved the defendant from the instance, with costs.

Postea (8th December, 1846).—A fresh declaration was filed substantially the same in terms as the other, save and except that, as to the form, the new action was not for verbal injury, but for damages.

The plaintiff called the following witnesses:

Thomas Jones Dickson.—I am an attorney. I was present at the preparatory examination in Heinemann's case for a few minutes. After the publication of the report of the proceedings at that examination I met Oppenheim in the street. He asked me if I had heard of the case against Heinemann. I said I had heard a great deal about it. He then said, "Mr. Norden wants to make out that we have robbed the creditors of Heinemann, but when it comes before the Court I'll show who was the party who robbed the creditors." I said I understood there was a very strong affidavit of Mr. Norden. He said, "Yes, there is; but Norden has sworn false in that affidavit."

William Innes.—I am an articled clerk to Mr. Hutchinson, attorney. I was present on the second day, at the preparatory examination against Heinemann. Plaintiff was under examination on oath when I came in. Defendant was there. When we came out, defendant was standing in the street near the steps of the court, and as Norden came out defendant called to him and said, "Do you mean to swear to all you have said in court to-day?" Norden said, "Oppenheim, I was upon my oath." Defendant replied, "Then, Mr. Norden, you have sworn falsely," or "your whole statement is false," I am not sure which. This must have been heard by a number of people who were round us. Defendant seemed to be in a passion, and spoke with great vehemence. During plaintiff's examination I heard defendant's name frequently mentioned by him.

Daniel Cloete.—I am Clerk of the Peace of Cape Town. Defendant has never lodged any complaint with me against Norden in respect of any alleged fraudulent transaction.

Carel Johannes Auret.—I am Clerk to the Resident Magistrate of Cape Town, and produce the Civil Record-book of his Court, containing the record of an action brought by plaintiff against defendant, dated 22nd April, 1846. (Record put in and read.)

"Benjamin Norden, &c., complains that Herman Oppenheim, &c., is indebted to him in the sum of £20 for liqui-

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dated damages sustained by him in consequence of the said Oppenheim having, on or about the 7th April, 1846, at Cape Town, and after the said Norden had given evidence in a criminal case against one Levi Heinemann, and was sworn under a judicial oath, stated to the said Norden the following words, to wit, 'Norden, the whole of your statement was false.' 2ndly,—For having, on or about the 12th April, 1846, at the Court of the Resident Magistrate for Cape Town, and whilst an investigation was held in the case against the said Heinemann, and the said Norden was giving evidence and referred to certain letter in which were contained advices regarding fraud from a certain individual fictitiously called Peter, stated to one Frederick Waldek, 'Ben Norden is the Peter,' and, also for having, on or about the 15th April, 1846, stated to the said Waldek of and concerning the said Norden, the following words, to wit, 'He is the Peter. If he says I am Peter, I say he is the Peter mentioned in these letters.'

"Defendant admits, and tenders £20, with costs.

"Judgment for plaintiff £20, with costs, £2 3s. 6d.

"P. B. BORCHERDS, Resident Magistrate."

Johannes de Kock.—I am an agent in the Resident Magistrate's Court, and attended there as agent for Heinemann, at his preparatory examination. The day after this examination defendant came up to me and said, "De Kock, do you think you will get Heinemann off?" I said I doubted that very much, but that we had engaged two Counsel, Messrs. Ebden and Brand. He said, "Your client has to thank for his misfortune, Ben Norden." I said, "No, I do not think so, because Norden's charge was not made against Heinemann individually, but against Hart, Canstatt, Bergtheil, and you into the bargain." He said, "He does that to expose us, and when the trial comes on in the Supreme Court there will be some nuts to crack for Mr. Justice Menzies, for I will expose all the robberies which Norden has committed in administering the estates or affairs of others." He also said, "I am very sorry for Heinemann, but when it comes into Court you will find that Heinemann's pretended friend has been the cause of his ruin."

James Hamilton Parker.—I have been plaintiff's bookkeeper since March, 1844, and as such know his transactions and affairs. He has not had any business transactions with Oppenheim, and only one with the firm of Killian & Co., of which defendant is the manager. This was in 1845. Defendant, for the firm, purchased some ready-made clothes,

and afterwards paid me the price when I called on him for it. This is the only transaction between them that I know of. The only insolvent estate in which I know that plaintiff acted as trustee was that of Wm. E. Smith.

Clerke Burton.—I am Master of the Supreme Court, and as such keep a record of all insolvent estates under sequestration. The only insolvent estates in which I recollect of plaintiff being employed during the last eight years were those of Mr. W. E. Smith, in which he was trustee, and of Bevil, in which he was one of the commissioners.

The defendant admitted that neither the defendant nor Killian & Co. had been creditors on either of these estates.

The plaintiff put in the following letter, dated 10th August, 1846:

"*B. Norden* vs. *H. Oppenheim.*

"Sir,—As this action has been instituted by the plaintiff not through mere pecuniary considerations, but to enable him to vindicate his character from what he conceives to be an unfounded calumny; to clear his character, both as an honest man and a merchant, from the double charge of fraudulent concoction of documents and robbery preferred against him by your client in the witness-box, and as it is possible that the plaintiff may be required, on trial by the Court, to show want of probable cause for the utterance of these aspersions, I have to request that you or your client will furnish me with some particulars of the occurrence to which he referred at the time he charged my client with having robbed him of £40, the date thereof, or some other clue that may enable the plaintiff to comprehend what the transaction was to which the defendant alluded.

"This the plaintiff believes the defendant will be enabled to do, inasmuch as in his evidence before the Court on the 5th day of May last, in the case of the *Queen* vs. *Heinemann*, the defendant has sworn that he 'knew of it' (the alleged robbery) the week previous. Mr. Oppenheim also stated that a similar thing (*i.e.*, the fraudulent concoction of some document) had been done by Mr. Norden in conjunction with another party. As my client has no desire to shrink from any investigation of his conduct, perhaps your client will favour me with the name of that third party: and if the document concocted be still in your client's possession, I beg that I may be permitted to inspect it, for the purpose of ascertaining whether its production in Court will be necessary on the part of the plaintiff. If it be not in his possession, perhaps he will inform me what has become of it, or where he last saw it.

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"I shall await your reply until noon of to-morrow, in failure whereof, the plaintiff cannot but conclude that no such transaction ever took place, and that no such document as that above mentioned ever existed, save in the imagination of the defendant, and he will avail himself on the trial of this cause of the present letter.

"I am, &c.,

"C. A. FAIRBRIDGE, Plaintiff's Attorney.

"To J. C. BERRANGE, Esq., Defendant's Attorney."

The *Attorney-General*, for plaintiff, tendered the oath of the plaintiff, in supplement, to prove that he had never at any time had any transaction with the defendant or with the firm of Killian & Co., or with any estate or person in whose assets either of them had been interested by means or in the course of which they, or either of them, lost through him a farthing.

Ebden, for the defendant, objected to the oath of the plaintiff being admitted.

The Court postponed giving a decision as to admitting the plaintiff's oath, as to the competency of which, under the circumstances of the case, they greatly doubted.

The plaintiff closed his case.

Ebden, for the defendant, moved for an absolution from the instance on the grounds on which he had obtained such an absolution from the instance in the previous case between the parties on the 13th July, 1846, and quoted the same authorities. (See first branch of this case.) And, secondly, maintained that in this case the plaintiff had not proved malice on the part of the defendant, or want of probable cause of belief of its truth, in giving the evidence which had been made the ground of the present action.

The *Attorney-General* argued, *contra*, that there is a distinction between this case and that formerly decided between the same parties, inasmuch as it was an action of slander, whereas this is an action on the case to recover damages for a certain verbal injury. And that all the English authorities quoted applied solely to actions of slander, and not to special actions on the case for defamation, which the present action is; and quoted, 1st, *Barnw. and Ald., p.* 245, *Note.* He admitted that in this case it was necessary for the plaintiff to prove malice and the want of a reasonable and probable cause for the injurious words; or, secondly, such a want of reasonable and probable cause as was sufficient in law to infer the existence of

malice. He maintained that the evidence in this case did prove such a want of reasonable and probable cause as necessarily inferred malice; and founded on the fact of the defendant having returned no answer to the letter of the 10th August, 1846, which had been produced and put in evidence. And also on the fact that the defendant had stated in his evidence as the reason why he had not complained to the Clerk of the Peace against the plaintiff for the alleged fraud, "I only found it out last week,"—while it had been proved by the Clerk of the Peace that no such complaint had ever since been made. He founded also on the evidence of Parker, on the tender of his oath made by plaintiff, and quoted *Cotton* vs. *James, Stephen's Nisi Prius, p.* 2285. Secondly, he maintained that the evidence proved the existence of malice (*animus injuriandi*) sufficient to infer the conclusion that the defendant, in using the injurious words, was actuated by malice and not by any reasonable or probable cause; and founded on the fact of the defendant having made no defence in the action of damages brought against him by plaintiff in the Court of the Resident Magistrate, and to the evidence given by De Kock. He admitted that when the injurious words applicable to the plaintiff used by the defendant, in giving his evidence as a witness in another cause, charged the plaintiff with the commission of some act which it was alleged had occurred when the defendant and the plaintiff were together alone (such as cheating at cards), and consequently, when no evidence extrinsic of the plaintiff and defendant could possibly be produced by the defendant, and there could at most be only the oath of the plaintiff against the oath of the defendant, the plaintiff could not successfully maintain an action similar to the present action; but he distinguished that case from the present by contending that here the injurious words, by their very terms, imported the discovery made by the defendant of a fact which, or at least the means by which it had been discovered by the defendant, were capable of being proved by the evidence of third parties, and the alleged particulars of which the defendant was therefore bound to disclose, in order to enable the plaintiff to disprove them, and his refusal to disclose which must be held to be an acknowledgment of the defendant that he had had no reasonable or probable cause for making the charge against the plaintiff; and founded on the analogy of the decision in *Borthwick* vs. *Carruthers*, 1*st Term Reports, p.* 649, to show that the defendant was bound to produce the evidence, which, if it ever did exist, lay within his own particular knowledge.

Brand followed on the same side, and maintained that the

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plaintiff was entitled to give his oath in supplement; and quoted *Cens. For.*, 5, 25, § 4.

Ebden, for the defendant, replied, and maintained that in England not even a special action on the case will lie against a witness, under any circumstances whatever, for anything said by him when in the witness-box under oath relevant to the matter at issue, and in reply to questions put to him, irrespective altogether of the *animus* of the witness in making the statement,—and that the case of an action for a malicious prosecution was quite different from that against a witness for words used in the box, because in the former the defendant had instituted the prosecution voluntarily, whereas the witness is compelled to give his evidence, and therefore ought to be completely protected from all risk of being harassed by any kind of action.

Cur. adv. vult.

Postea (10th December, 1846).—The Court informed the Counsel for the parties that their opinion was against the defendant on the point taken by him in support of the motion for an absolution from the instance, namely, that no action could be maintained against a witness for words spoken by him in the box when under oath in answer to questions put to him; and that they were of opinion that if the plaintiff had succeeded in proving, by the evidence he had led, the allegations in his declaration of malice, falsehood, and want of reasonable and probable cause on the part of the defendant, his action for damages was good. And therefore now called on the defendant to elect either to lead evidence to contradict the evidence of the plaintiff or to close his case.

Postea (18th December, 1846).—*Ebden*, for the defendant, stated that he did not mean to lead any evidence, and closed his case.

The *Attorney-General* was then heard on the whole case, and repeated the arguments which he had maintained in opposing the defendant's motion for an absolution from the instance; and further referred to the speeches of Lords Lyndhurst, Campbell, Denman, and Brougham, in *Hansard's Parliamentary Debates, vols.* 292, 293, 297, 298, 299, 462, *and* 469, § 9. He maintained that the injurious words used by defendant, although they followed a question, were not in answer to any question, and were therefore volunteered and immaterial, and consequently not privileged. And that malice and want of probable cause had been proved in this case even by the conduct of the defendant in not specifying the fraud which he alleged to have been com-

mitted by the plaintiff, and not bringing evidence as to the grounds of his belief. And quoted *Stephen's Nisi Prius, pp.* 22, 23, and the cases therein cited.

Ebden argued *contra*, and particularly relied on the authority of the case reported in the *Utrechste Consultations, vol.* 2, *Con.* 100, *p.* 414.

The grounds of their judgment in this case, stated by MENZIES and MUSGRAVE, JJ., were in substance and to the effect following:

This action has been brought to recover damages on account of an injury alleged to have been inflicted on the plaintiff by the defendant, by reason of certain words uttered by the defendant of and concerning the plaintiff. The declaration sets out by alleging that the words complained of were uttered by the defendant in the witness-box, when he was under examination on oath as a witness in a criminal action at the instance of the *Queen* vs. *one Levi Heinemann.* In the ordinary case of an action for slander or verbal injury, brought against a defendant who has uttered injurious words against the plaintiff extrajudicially, and not in the course of his examination as a witness, it is sufficient in the first instance for the plaintiff to prove that the defendant uttered the injurious words complained of. The law presumes the injurious words to be false until the defendant, under a plea of justification, shall have proved them to have been true, and it presumes that they were uttered by the defendant maliciously until he shall have proved circumstances sufficient in law to rebut this presumption of malice. In the case last supposed, the proof by the plaintiff of the utterance of the injurious words by the defendant throws on the latter the *onus probandi* that they were true, and were not uttered maliciously. But the question in the present case is, has a defendant who has uttered the injurious words complained of while under examination on oath as a witness, any privilege or protection which in his case throws the *onus* on the plaintiff of proving not merely the utterance of the injurious words by the defendant, but also that they were untrue, and that they were uttered maliciously? It is admitted that no reported decision of the Courts of Holland or of the Colony, nor any doctrine of any of the text-writers, recognized as authorities on the law of Holland, has been found which is decisive of the present question. This case must, therefore, be decided on such general principles applicable to it as can be discovered in the law of Holland, or which can be derived by analogy from the laws of other countries. The law of Holland recognizes several cases in which the situation of the person who has uttered the injurious words, or

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the circumstances under which they have been uttered, are held to make his case a privileged one, and to remove to a greater or less degree the legal presumption of *animus injuriandi*, which would otherwise arise from the injurious nature of the expressions which have been used; for example, the case of judges, while engaged in the discharge of their office, and of parties to a cause as to observations made on the adverse party or his witnesses. (*Voet*, 47, 10, 20.) Now, the claim of a witness to privilege for what he has stated under oath, and while under examination, is much stronger than that of either a judge or a party. The law forces him, whether he will or not, to attend the Court, to take an oath to speak the truth to the best of his belief, and to answer the questions put to him. If asked, he must state not only what he knows, but what he believes, and what are the grounds of his belief. He is under a compulsion which leaves him no discretion. He is forced to state his own impressions on the subject, no matter how formed. He is compelled to state his belief, the grounds of which, in nine cases out of ten, it may be impossible for him to prove. It would, therefore, be the height of injustice to expose him to an action for damages merely because he could not prove that which he has been forced to utter. That the statements he has made were made on oath is a legal ground for presuming that they were true, or, at least, believed by the witness to be true. That they were made under legal compulsion is a legal ground for presuming that they were not made *animo injuriandi*. The law of England recognizes and gives effect to those principles to the fullest extent. A long series of authorities has been produced, showing that by the law of England a common action for slander will not lie against a witness for statements made by him as such, and in relation to the subject-matter of his examination. From these authorities (*vide* particularly Lord Campbell's opinion in the passages quoted from *Hansard* by the defendant's Counsel) it is clear that even to the present day there is a strong impression on the mind of some eminent English judges and lawyers that no action whatever, not even one on the case, will lie against a witness for such statements; and that if an action on the case will lie at all, the plaintiff, to support it, must not only aver in his declaration, but prove that the injurious statements made by the defendant were false, that he had no reasonable or probable cause for believing them to be true, and that in making them he acted from positive malice. The same principle seems to be recognized by the law of Scotland. (*Vide Borthwick on the Law of Libel, p.* 203 *et*

seq.) Although no decision given by any Supreme Court in Holland has been found expressly deciding the question at issue, an authority entitled to very great respect has been produced by the defendant, namely the *Utrecht Consultations, vol.* 2, *Cons.* 100, *p.* 414. It is true it is nothing else than the opinion given by three lawyers, but these lawyers were eminent lawyers of the day, and their opinion is given under such circumstances as to lead to the conclusion that it was their deliberate and *bonâ fide* opinion. From this opinion it is clear these lawyers held, first, that by the law of Holland no *actio injuriarum* (*i.e.*, action for slander) would lie against the witness, but only the *actio ad damnum et interesse* (*i.e.*, an action on the case for damages); secondly, that what the witness stated on oath would be presumed to be true until it should be proved to be false; thirdly, that the witness would be presumed to have acted *sine animo injuriandi* until it should be proved not only that what the witness stated was untrue, but that when he made the statement on oath he had such knowledge that it was untrue as to render him guilty of perjury in making it. The principles laid down in this opinion are in substance identical with those laid down by Mr. Justice Coleridge in the note to the report of the case *Hodgson* vs. *Scarlett*, 1*st Barn. and Alder.* As these general principles have thus been shown to be recognized in the laws of Holland, England, and Scotland, and to be based in justice and equity, they were of opinion that, in the absence of any more express authority or decision, the Court ought to follow them in deciding this case. The Court, as far as that decision went, did so in absolving the defendant from the former action brought against him by the plaintiff for the same injurious words, on the ground that the plaintiff had merely proved that these words had been used by the defendant while under examination on oath as a witness, without offering any evidence to prove either that they were untrue, or that, if so, the defendant had no reasonable cause for believing them to be true, or that he had been actuated in using them by express malice. The Court then held that the plaintiff had not done enough, leaving him to bring a new action and supply those defects if he could. The plaintiff has accordingly brought the present action, and in his declaration has averred, first, that the injurious words there set forth were uttered by the defendant, not in the fair, reasonable, or *bonâ fide* performance or exercise of any duty or obligation incumbent upon him as a witness; second, that he uttered them unnecessarily, wantonly, and maliciously; third, that they were false; fourth, that he had no reasonable or probable cause for believing them to be true. They were of opinion that

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these averments were sufficient to support the plaintiff's conclusion for damages, and that if he had succeeded in proving them by the evidence he has produced, he is by law entitled to recover damages from the defendant. As to the first and second of these points, it is to be observed that the plaintiff has in his declaration himself alleged that "it was a question in the said trial by whom a certain writing produced and shown to certain witnesses had been written and prepared." And from the report of the trial of Heinemann, it appears that his Counsel, by the cross-examination of the present defendant, endeavoured to make out that the document was shown by Heinemann to the latter immediately after Heinemann's arrival in Cape Town, at a time and under circumstances which would necessarily have established that the present defendant was an accomplice in Heinemann's fraud. To rebut this charge against himself the defendant stated, "I positively believe that the paper was made out afterwards by some party." Upon this he was asked by the presiding Judge, "By whom do you believe?" To this question the defendant answered, "I believe that it was Mr. Norden." He was then asked by the Court, "Do you mean that this paper was written by Mr. Norden?" and answered, "I cannot say if it was in his handwriting, but I say it was concocted by Mr. Benjamin Norden." The witness then also stated in the expressions which were made the foundation of this action the grounds on which this belief was founded, and the presiding Judge (MENZIES, J.) has stated that the course of the examination was such, although he had not yet been asked for the grounds of his belief, the witness must have been aware that he would be required to state the grounds of his belief, and that in point of fact, if the witness had not stated them himself, the next question put by the Judge to him would have been, "On what grounds do you believe that this paper was made out or concocted by Mr. Norden?" It is further to be observed that although the defendant had undergone a very long examination both in chief and cross, he never introduced the plaintiff's name in his evidence until near the end of his cross-examination, when the direct question was put to him by the Court, "By whom do you believe that the paper in question was made out?" and that if he had been suffered to leave the box without being cross-examined on that particular subject he would not only not have stated any thing unfavourable to the plaintiff, but not even have mentioned his name. The statements made by the witness were therefore answers directly pertinent to questions which had been put to him, which it was his duty to answer, and which he could not refuse to answer without

exposing himself to be punished for his contempt of Court. They were, therefore, of opinion that if the statements so made by the witness were either true or, though untrue, if he had reasonable grounds for believing them to be true, the plaintiff had failed to establish the first two propositions which he had averred in his declaration, and without which he could not maintain the present action, namely, first, that the injurious words were uttered by the defendant not in the fair and reasonable or *bonâ fide* performance or exercise of any duty or obligation incumbent on him as a witness, and secondly, that he uttered them unnecessarily, wantonly, and maliciously; and that, on the contrary, both these averments were completely disproved by the evidence. That on these grounds, therefore, the defendant, with respect to the statements made by him, which are complained of by the plaintiff, was, and is, entitled to the privilege belonging by law to a witness, whatever that may be. The plaintiff's Counsel has, however, contended that although this might have been true if the person respecting whom the injurious statements were given in evidence was one of the parties to the cause, yet that a witness has no privilege in regard to such statements made respecting a third person who was no party to the cause. But no principle either of law or justice has been or can be alleged in support of this distinction. It is not because the statements given in evidence by a witness have reference to either of the parties in the cause that any privilege is given to the witness, but because those statements were given by him as pertinent answers to questions which the Court put, or suffered to be put, to him, and which he was compelled to answer both by the obligation of his oath and by the fear of being punished for contempt if he refused to answer them. The Court may have been wrong in allowing questions respecting a third party to be put to the witness, but with that the witness has no concern; he could not refuse to answer any questions put to him by or with the sanction of the Court, on the ground that it referred to or implicated a third person not a party to the cause. The only remaining questions for consideration in the case are, first, has the plaintiff proved that the injurious statement respecting him made by the defendant was false, that is, untrue, and known to the defendant to be untrue, at the time he made it? Or, secondly, if proved to be untrue, has the plaintiff proved that when defendant made it he had no reasonable or probable cause for believing it to be true? On looking at that part of the evidence given by the defendant which in the declaration is set out as the foundation of the present action, and to the plaintiff's innuendoes as to its meaning, it is clear that the plaintiff claims damages

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not on account of the defendant having stated that he believed the plaintiff had concocted the document in question marked W, but for having stated, as part of the grounds on which that belief was founded, "that two years ago Mr. B. Norden did a similar thing with another party, by which I was robbed. I was robbed of £40." And on looking at the report of the trial of Heinemann, or even only at that part of the defendant's evidence on that trial which has been put in proof in this case, it is equally clear that the only thing, the being guilty of which the defendant meant to impute or did impute to the plaintiff, was that about two years ago he had assisted some insolvent or pretended insolvent (other than Heinemann) in effecting some scheme or arrangements by which, while some of his creditors were paid in full, others were defrauded of the whole or part of their debts, by which scheme or arrangement the defendant, who was a creditor of that insolvent, or pretended insolvent, had been robbed or defrauded of £40. Now what is the nature of the evidence which the plaintiff has adduced to prove that this accusation was either falsely made by defendant or was untrue? The plaintiff has indeed proved, first, that he never had any transactions in trade with the defendant, or with the firm of which defendant was the manager, by which he either did defraud or could have defrauded the defendant; secondly, that he was never the trustee or commissioner in any insolvent estate in which the defendant was a creditor, and consequently that he never did defraud the defendant in either of those capacities. But the defendant had never stated that the plaintiff had been guilty of either of those two kinds of offences. The fraud he imputed to him was altogether of a different nature from either, so different that the defendant could neither have pleaded, nor proved, that the plaintiff had been guilty of either, in justification of the accusation against the plaintiff made by him in his evidence. The evidence adduced by the plaintiff, therefore, has no more effect in proving that the statement respecting him made by the defendant was false, or untrue, than if he had proved that he had never been guilty of sheep-stealing. The plaintiff having thus failed to prove the defendant's statement to have been either false or untrue, there is no room or legal ground for any inquiry as to whether the defendant had reasonable or probable cause for believing it to be true; and there would at once have been an end to the plaintiff's case, had not his Counsel very ingeniously endeavoured to show that there are circumstances peculiar to this case which excludes it from the operation of the general rule, and which throws on the defendant the *onus*

of proving that what he stated against the plaintiff was either true, or that he had reasonable or probable cause for believing it to be true. He has contended, and it may be admitted, first, that in consequence of the defendant having been stopped by the Court, on Heinemann's trial, before he gave the details of the fraudulent transactions in which he accused the plaintiff of having been an accomplice, and of having afterwards refused to communicate those details to the plaintiff, it has been rendered utterly impossible for the plaintiff to know what the particular transaction was to which the defendant alluded, and consequently utterly impossible for him to bring evidence to prove that no such transaction ever took place; second, that by the letter from his attorney to the defendant's attorney, dated 10th August, 1846, and otherwise, he has done everything in his power to obtain from the defendant such a specification of the details of that transaction as to enable the plaintiff to prove that it had not taken place; and, third, that although it may be unjust, and therefore contrary to law, to call upon a defendant to prove the truth of injurious statements made by him as a witness, under the penalty of their being presumed in law to be false, in any case in which from its nature it is evident that there could not possibly be any witnesses whom either the plaintiff or the defendant could produce, yet, as in this case it is clear, from the nature of the statements of the defendant, that it must be in his power if his statements were true, to prove them, or, if he had had probable cause for believing them to be true, to prove that probable cause, they must, in the absence of such proof from him, or at least such a specifiaction by him of circumstances as would let the plaintiff into proof as to their falsehood, be presumed to have been untrue, and to have been made without probable cause for believing them to have been true. And, as a farther ground in favour of this presumption, he has founded on the fact that the defendant has not instituted any criminal proceedings against the plaintiff on account of the fraud in which the defendant alleged that he had been an accomplice. These reasons, and the arguments founded on them by the plaintiff's Counsel, do not appear sufficient in law to warrant the conclusions which he has endeavoured to draw from them. The plaintiff's case may be, indeed, a hard one in being deprived of the opportunity of even attempting to disprove that of which he has been accused; but as he has not been brought into this situation by the voluntary act of the defendant, its hardship to the plaintiff can afford no legal ground for, on that account, withdrawing from the defendant that protection which the law

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has provided for witnesses, and for putting him into a situation of even greater hardship, namely, compelling him to succumb under evidence which may be brought against him by the plaintiff, unless he can rebut it by stronger evidence in his favour; and which hardship has been imposed upon him not in consequence of any act of his own, over which he had any control, but because he was, in the first place, compelled by law, whether he would or not, to give his evidence in answer to questions put to him; and second, because he was forced, by the obligation of an oath, to state not only what he believed, but the grounds of his belief, and that without reference to whether he was in a situation to be able either to prove that what he said was true, or to prove the existence of the grounds on which his belief was founded. The privilege given to witnesses is not given as a favour, but as an act of justice, and the witness ought not to be deprived of that to which he has a just right, merely because the allowing him to enjoy it would, without any fault on the part of the witness, impose some hardship on a third party. Nor can the refusal of the defendant to supply the plaintiff with the means of making an attack upon him, from which, however groundless, he may not have the means of defending himself, by producing evidence to rebut that which may be brought by the plaintiff, be any ground for depriving him of the privilege to which he would by law be otherwise entitled. Nor does the fact of his not having instituted any criminal prosecution against the plaintiff warrant any other presumption than that he has it not in his power to produce sufficient legal evidence of the plaintiff's guilt to ensure his conviction. None of the circumstances founded on by the plaintiff's Counsel afford any reason necessarily creating a presumption either that what he stated was untrue, or that he had no probable cause for believing it to be true, although they may be admitted to form very strong grounds for concluding that the defendant is now unable to produce evidence to prove either. But so far from this inability to produce evidence for these purposes being a ground for depriving him of the protecting privilege granted by law to witnesses, the possible inability of the witness to produce such evidence is the very ground in respect of which the law has granted the privilege. The last argument by which the plaintiff's Counsel has endeavoured to show that in this case the *onus* of proving the truth of his statements, or at least that he had reasonable cause for believing them to be true, ought to be imposed on the defendant is, that he has been proved to have entertained and expressed such strong and positive malice against the

plaintiff that he must be presumed to have been solely actuated by it, when in the course of his evidence he made these statements injurious to the plaintiff which are the grounds of the present action; and consequently is not entitled to the privilege which would belong to a witness whose evidence had clearly been given *sine animo injuriandi*. And in support of this argument he has referred to the expressions which the defendant was proved, by the witnesses Dickson, Innes, and De Kock, to have made use of respecting the plaintiff, and in respect of some of which the plaintiff recovered damages from the defendant in the Court of the Resident Magistrate of Cape Town. But in looking at the evidence of these witnesses it is clear that before the defendant had used those expressions, the plaintiff had, in his deposition, made in the course of the preliminary examination against Heinemann, accused the defendant of having been an accomplice in Heinemann's fraud, and that those expressions were used with direct reference to this accusation, some of them in express contradiction of it, and in defence of the defendant against it, and the rest merely as *retorsio injuriarum*, which in his deposition the plaintiff had been casting on the character of the defendant; and, consequently, that from these expressions, in consideration of the circumstances under which they were uttered, the law would not presume, even in an action against the defendant founded on them, that he had used them *animo injuriandi*. (*Vide Voet*, 47, 10, 20, and the decision of this Court in the case of *Haupt* vs. *Elster*, *9th December*, 1845, *ante*, *p.* 39.) But even if these expressions should be considered as proving the existence in the mind of the defendant of personal hostility and ill-will against the plaintiff, even to such an extent as to make him glad that the answers which he had been required to give to the questions put to him had elicited from him disclosures prejudicial to the character of the plaintiff, the proof of the existence of such hostility or ill-will does not prove the existence of that malice which alone is held by law to be sufficient to deprive a witness of his privilege, namely, such malice as has induced the witness, in answering questions put to him, to make, for the purpose of injuring the plaintiff, statements injurious to him which the witness knew, when he made them, to be false, or such malice as has induced the witness to introduce in the course of his evidence, for the purpose of injuring the plaintiff, some statement injurious to him, irrelevant, and not pertinent to any of the subject-matters as to which his evidence was required, even although when he made it he believed it to be true. Now it has not been proved that the statement made by the defendant was

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false, much less that he had no reasonable cause for believing it to be true; and it has been proved that the statement made by defendant was made pertinently in answer to a direct question put to him on the very subject with reference to which the statement was made. And further, in positive contradiction of the charge that the defendant, in making the statement he made, was actuated by malice against the plaintiff, there is the fact, already alluded to, that in the course of a very long examination-in-chief and of a very severe cross-examination, the defendant never even mentioned the plaintiff's name and would have left the box without having done so unless certain direct questions had been put to him as to the name of the person by whom he believed a certain document had been concocted, and his reason for believing that it was so concocted by the person whom he named. On these grounds they were of opinion that the plaintiff had totally failed to show that there were any circumstances peculiar to this case sufficient to exclude it from the operation of the general rule of law on the subject, and to deprive the defendant of the benefit of the privilege which the law has established for the protection of witnesses; and, therefore, that judgment must be given for defendant, with costs.

WYLDE, C.J., concurred in the general principles on which the above judgment was founded, and as to the nature of the privilege enjoyed by witnesses in general cases; but was of opinion that the particular circumstances in this case founded on by the Attorney-General, more especially when considered in connection with each other, were sufficient to exclude the application of the general rule to this case, and to throw on the defendant the *onus probandi* either that what he had stated to the injury of the plaintiff was true, or at least that he had probable cause for believing it to be true. And as the defendant had failed to prove either, that judgment should be recorded for the plaintiff, damages £25 and costs.

The Court gave judgment for the defendant, with costs.

PANTER, APPELLANT, *vs.* O'DRISCOLL, RESPONDENT.

Verbal injury. Reasonable grounds for suspicion, when a defence.

1847. Aug. 24.

Panter, Appellant, vs. O'Driscoll, Respondent.

The respondent in this case had sued the appellant in the Court of the Resident Magistrate of Cape Town for the

sum of £20 as liquidated damages sustained by him by reason of the appellant having, on the 1st June, 1847, stated, in the hearing of John King and Thomas Pope, that he had his shop in Rose-street, Cape Town, broken open, and had been robbed of about £2 in silver and copper money, and that this robbery had been effected by some person opening the door next Wale-street, and so entering the shop, and taking away the money from the till; and also by the appellant making a false, malicious, and defamatory charge to the Inspector and Sub-Inspector of Police, stating that the robbery was committed by the policeman on duty, thereby meaning the respondent, who was then on duty on the beat in Rose-street at the time the appellant stated the robbery to have taken place.

The appellant appeared, and denied having charged the respondent with the robbery; also denied having made a false charge of the robbery of the shop, and pleaded that he had made the charge to the Inspector of Police on grounds of reasonable and probable cause.

The witnesses examined on the part of the respondent and appellant proved the following facts:

Jan Hendriks: On the night of the 31st May I passed the defendant's house in Rose-street at twelve o'clock. When I came to the bridge in Buitengracht I met the policeman there, which is about twenty-five or thirty feet from defendant's house. I saw no other person there then or afterwards, for I went home.

Carel F. H. Reigert: On the night of the 31st May, between one and five o'clock, I found the defendant's shop-door open. I knocked at the door and called loudly to defendant. Nothing was said in my presence about anything being lost. He thanked me, and I went away. When I gave the alarm I saw a policeman and two other persons. The policeman was about fifty yards from defendant's house when I knocked. He was coming towards defendant's shop. I think the policeman might have heard my knocking and calling.

Sarah Viret: I was in defendant's service in May last. On the night of the 31st May, about half-past nine, I saw the till in its proper place, and money in it. Defendant and I left the shop about the same time that night. Afterwards, at twelve o'clock, I heard a knock at the door, and some one, I don't know who, called out, "Mr. Panter, your shop-door is open." The knocking and calling was loud. Mr. and Mrs. Panter and I got up and went into the shop, and there found the till removed from its proper place, and the money I had seen in it at half-past nine gone. I don't know how much.

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Panter, Appellant, vs. O'Driscoll, Respondent.

Thomas Pope: I am a Sub-Inspector of Police in Cape Town. The plaintiff was a policeman, and was on duty as such on the beat including Rose-street, &c., &c., from nine o'clock p.m. of 31st May till six o'clock a.m. of 1st June last, when he was relieved. About four o'clock p.m. of the 1st June defendant came to the Police Station-house, and reported that his shop had been broken open by a tall policeman on the preceding night. I said, "Surely, you do not mean such a thing," and he said, "Yes, my shop was robbed by the tall policeman." We then went into Mr. King's office. Defendant said, "I am come to report that my shop has been robbed last night of about £2 in silver and copper by one of your men." Mr. King asked him, "What sort of a man is he?" Defendant replied, "A tall thin man." Defendant said the shop-door had been left on the latch through neglect. Mr. King then called the plaintiff down, and asked him if he had seen defendant's door open during any part of the preceding night? He said no; that he had seen two men rapping at the door in Rose-street about half-past twelve o'clock; that he had stopped and looked at those men; that he thought they were coming from a party, and that he walked on without interfering.

John King, Inspector of Police, corroborated the evidence of the preceding witness, and added: I then told him defendant suspected him of robbing the shop, which he denied. Plaintiff was then sent away, and defendant said, "That is the man; I know him, as I had been speaking to him on Saturday night last." I requested the defendant to come before the Judge of Police the next morning with such witnesses as he could get to support the charge. I asked him why he had not made this report sooner? He replied, "I did not make out who had done it till now." I caused plaintiff's box to be searched, but no money was found. In consequence of the charge I did not allow plaintiff to go out on duty that night. I took him before the Judge of Police next morning, to whom I explained the charge in the presence of the plaintiff and defendant. The defendant said he had no charge whatever to make against the man.

Pieter Auret: The case now in question was brought before me as acting Judge of Police, on the morning of the 2nd June. The plaintiff and defendant both appeared before me. I asked defendant whether he had any charge to make against the plaintiff, as Mr. King had informed me that he, the defendant, had charged the plaintiff with the robbery. Defendant replied he had no charge to make against the plaintiff, and denied having charged him with the robbery.

Case closed.

Judgment for plaintiff for £5; costs, £2 6s. 9d.

The defendant brought this judgment under review.

This day, after hearing the Counsel for the parties, the Court, on the same principle on which they decided the case of *Haupt* vs. *Finlayson*, 12th December, 1844 (*ante, p.* 38), reversed the sentence of the Resident Magistrate, and condemned the respondent to pay the appellant's costs in both Courts.

MENZIES' REPORTS.

[NEW SERIES.]

1828-1849.

VOL. III. PART II.

CHAPTER I.—SECTION I.

TUTORS AND MINORS.

GANTZ *vs.* WAGENAAR.

1828. Dec. 30.

Minority held a sufficient defence, without even allegation of the lesion of the minor by the transaction (MENZIES, J., *dis.*) *against a provisional claim on a case entered into by a minor, with the assistance of his mother, not his legal guardian.*

[Vol. I, p. 92.]

GREEF *vs.* VERREAUX.

Minor's marriage.

1829. March 20.

How far a promise of marriage by a minor, subsequente copulâ, is valid.

The parent's consent is necessary in such case, although the minor be emancipated; and it makes no difference in the principle to be applied that the defendant, in an action

1829. March 20. *of seduction, who was a minor when the pleadings closed and the trial took place, became major before judgment given.*

But if the action had been brought against defendant after majority, SEMBLE, *he would not have been entitled to found on his minority at the date of the contract.*

[Vol. I, p. 151.]

DE VILLIERS *vs.* STUCKERIS.

June 16. *Tutor not ipso facto deprived of office by insolvency.*

[Vol. I, p. 377.]

PRINCE, Q.Q. DIELEMAN, *vs.* BERRANGE, *alias* ANDERSON.

Minors, education of.

1830. June 24. Sept. 30. SEMBLE: *Tutors cannot recover what they have expended on education of ward more than the annual interest of minors, without authority of the Court.*

SEMBLE: *Tutors entering into litigation concerning the property of minors without the authority of the Court are personally liable for the costs, and cannot recover from minors if unsuccessful.*

[Vol. I, p. 435.]

NIEKERK *vs.* NIEKERK.

Co-tutors: as to their liability in solidum towards minors.

June 30. Dec. 9. *They may arrange among themselves for the active administration by one of their number, he to be first excussed for any fault of commission; but for the consequences of his omission all are liable in solidum, with benefit of division, but not of excussion.*

The least act makes an administering tutor, e.g., signing the liquidation account.

Where at the date of majority some of the co-tutors were insolvent, the minors are entitled to recover proportionately from the solvent tutors; but not where the insolvency has taken place since majority. 1830. June 30. Dec. 9.

Interest cannot be claimed from a tutor on behalf of minors to an amount exceeding the capital of their inheritance.

[Vol. I, p. 452.]

IN RE DUSING.—NEZER *vs.* CREDITORS OF DUSING.

Tutors: appointment for minor heirs does not include minor legatees, who, therefore, have no preference on the estate of such tutors. Sept. 29. Oct. 11.

[Vol. I, p. 480.]

IN RE LORD.—BLANCKENBERG *vs.* GUARDIANS OF LORD.

Minors not entitled to preference on bonds in their favour granted by a person not their tutor. Sept. 29. Oct. 11.

[Vol. I, p. 483.]

IN RE HOFFMAN.—HOFFMAN'S CREDITORS *vs.* WOLVERANS.

Tutor: a person who was really only a joint administrator, having acted as pro-tutor, liable as such towards minors. 1831. Dec. 6.

[Vol. I, p. 534.]

[*Sed vide* Act 5, 1861.]

RICHERT'S HEIRS *vs.* STOLL AND RICHERT.

Inheritance of minor grandchildren. Father having died before grandfather, and the father having, during his lifetime, acknowledged the debt, and expressed in writing his willingness that such debt should be deducted from the 1832. June 7.

1832. June 7. *inheritance he was to receive.* HELD, *that this was a discharge by him pro tanto of his claim under the will, and bound his representatives.*

Compensation is allowed of minor grandchildren with debt of their father due to grandfather.

[Vol. I, p. 566.]

GRAY *vs.* RYNHOUD, ASSISTED BY HER FATHER.

March 1. *A promise of marriage by an unemancipated minor, without parent's consent, is wholly invalid.*

[Vol. I, p. 150.]

FARMER *vs.* FARMER.

1837. Nov. 1. *Who entitled to the custody of an infant child born after a voluntary separation.*

[Vol. I, p. 240.]

IN RE WRIGHT.

1842. Jan. 12. *Where an amount settled on a wife, then a minor, by antenuptial contract, has not, as stipulated by the contract, been secured by mortgage on landed property, but becomes merged in the private funds of one of the trustees after the wife's majority, no tacit hypothec is created for such amount on the insolvent estate of such trustee.*

[Vol. I, p. 166.]

FARMER *vs.* FARMER.

Minor, custody of.

Nov. 26. *After a divorce for adultery, the innocent wife held entitled to the custody of a boy, the offspring of the marriage, of six years old.*

[Vol. I, p. 278.]

ASSUE *vs.* CURATOR OF ASSUE.

Transfer to minor, without beneficial interest, set aside. 1844. Aug. 30.

[Vol. II, Part 2, p. 62.]

VON BIHL'S AGENTS *vs.* LOMBARD BANK AND OTHERS.

Minor's hypothec on property of guardian.

[Vol. II, p. 329.]

MATHYSSEN *vs.* SANDENBERG'S TRUSTEES.

Minors in a foreign country, tacit hypothec of, on estate of administering guardian. 1843. Nov. 30.

[Vol. II, p. 353.]

VAN DER POEL'S EXECUTORS *vs.* MARAIS AND OTHERS. 1844. Aug. 27.

Tutorial hypothec.

[Vol. II, p. 360.]

IN RE MINNAAR.—MINNAAR'S CREDITORS *vs.* EXECUTOR AND GUARDIAN OF NEETHLING.

Minor's hypothec.

Minors, heirs, or legatees have no tacit legal hypothec on the estates of executors for losses occasioned by them in their capacity.

1832. Dec. 31.

In Re Minnaar.—Minnaar's Creditors *vs.* Executor and Guardian of Neethling.

In this case, the circumstances of which it is unnecessary to report, the only question of law decided by the Court was, that minors have no tacit legal hypothec on the estates of the executors of estates on which such minors, as heirs or legatees, have claims, for deficiencies or losses occasioned to the minors by the acts of such executors *qua* executors. (*Voet*, 20, 2, 14.)

Ex Parte—The Committee for the Management of Juvenile Emigrants.

Minor. Jurisdiction of Supreme Court to appoint guardians over.

1833. June 1.

Ex parte—The Committee for the Management of Juvenile Emigrants.

This day a memorial was presented by Mr. E. Christian and others, styling themselves the Committee of Management for and on behalf of certain juvenile emigrants recently brought to this Colony, stating:

"That the committee of the society established in London for the suppression of juvenile vagrancy, having previously obtained the sanction of the Secretary of State for the Colonies, selected from their institution and shipped twenty boys for transport to this Colony as emigrants, consigned wholly to the care and management of the memorialists, for the purpose of being indentured out as apprentices, for a term or until of age, to various trades or employments, and on such stipulations and conditions as might be found desirable and proper.

"That the memorialists, as such committee, on the arrival of the said twenty boys (here specifying their names and ages), took them into their entire charge and management; and in prosecution of the purpose as to their future establishment in life, for which they were sent out as emigrants to this Colony, have already placed out the said twenty boys, at their choice or with their consent, in different situations or employments, under conditions and covenants to be hereafter rendered obligatory, secured and limited under legal indentures to be duly executed thereon.

"And as the said boys are without parents or any natural or other guardians within the Colony, they will be left insufficiently protected as to their personal interests, unless legal guardians and curators in that respect be appointed under and by virtue of the authority of this Honourable Court.

"The memorialists therefore pray that this Honourable Court may appoint them, as forming such committee as aforesaid, the guardians and curators of the said twenty boys, until respectively of age, or until further order of this Court, with all such powers and privileges, and under and subject to such liabilities and responsibility as in law may attach and belong to such their appointment, or as this Court may see fit to order and direct in the premises."

Whereupon it was ordered by the Court (*postea*, 29th June, 1833) that the said committee be appointed superintending guardians of the said twenty boys. The indentures, to be re-executed from the date of this order of the

appointment of the committee as guardians, when the Master shall have approved of the forms of the indentures, the said twenty boys to be apprenticed subject to the covenants thereof.

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Ex parte—The Committee for the Management of Juvenile Emigrants.

The Court resolved that the like proceedings should be adopted, and the like order made, in all similar cases which might thereafter occur.

GREYBE AND HIS WIFE *vs.* WIDOW WIID.

Parent and Child. Minor. Guardian.

In a question between the mother, who had re-married, and the paternal grandmother, concerning the guardianship of a minor, the grandmother found to be best entitled.

S. J. Wiid and his wife, H. H. Peo, had a daughter named Maria Catharina. S. J. Wiid died, and his widow, H. H. Peo, married the plaintiff Greybe, while her said daughter was still a minor.

June 4.

Greybe and his Wife *vs.* Widow Wiid.

By the mutual will of the deceased father and his widow, now Mrs. Greybe, it was provided that in case the survivor should come to be inclined to a second marriage, the same should be obliged and bound, before the consummation thereof, to choose and appoint good and irreproachable persons as superintending guardians over the aforesaid children's portions.

A question arose between the plaintiff and his wife, and the Widow Wiid, the paternal grandmother of the minor, as to the guardianship and custody of the minor.

In support of the claim of the grandmother, *De Wet* quoted *Van der Linden's Institutes, B.* 1, *ch.* 5, § 1, 98; *Sande, Dec. l* 2, *t* 9, *Def.* 3; *Voet,* 26, 4, 2, 3, 4, in order to show that by her second marriage the mother in this case had *ipso jure* ceased to be the tutor of the minor.

Cloete, contra, quoted *Grot., Inl.,* 1, *B.* 7, *Decl.,* § 11; *Schorer's Notes,* § 11, *No.* 18.

The Court, in respect of the authorities quoted by *De Wet,* held that after the second marriage of the mother, and under the circumstances of the case, the grandmother was best entitled to the guardianship of the minor; and discharged the rule *nisi* which Greybe and his wife had obtained against the widow, to show cause why the said minor should not be removed from the said widow's residence, and restored to the charge of the mother and her second husband.

In Re Cloete.—Wolverans *vs.* Cloete.

Guardian, Co. Hypothec. Cession.

A co-guardian having paid out of his own funds to his ward an amount misappropriated by his co-tutor, has a good action against such co-tutor, but does not acquire minor's hypothec against co-guardian without cession.

1833. June 26. — *In re* Cloete.—Wolverans *vs.* Cloete.

The Court held that where one of two co-tutors has paid out of his own funds to his ward the amount of assets belonging to the ward, but which have come into the hands of the other co-tutor, although he has a good claim against the latter for the amount which had come into the hands of the latter, he did not by such payment to the ward, and without any cession from the ward, *eo ipso* acquire the same preference for that amount over the estate of his co-tutor which the ward would have had, if he or she had not been paid by the co-tutor first mentioned; and on this ground confirmed the trustee's plan of distribution, with costs.

Cloete, for Wicht, a mortgage creditor, to whom preference over Wolverans, the co-tutor, had been awarded by the trustee against the co-tutor's claim for preference, quoted *Peckhoven de Pignaribus, B.* 15, *c.* 1; *Loenius, Dec.* 110; *Voet*, 20, 2, 18, and 16, *ff* 26, 7, 42.

Hofmeyr, contra, for Wolverans, and in support of the co-tutor's claim for preference, quoted *Voet*, 20, 2, 14, 20, 612; *Brunneman, Cod. Digest*, 26, 7, 42; *Supplem. Holl. Cons., 2nd vol., cas.* 89.

In Re Fehrzen.

Minor: education of.

The Court, on the application of a tutor, authorized, after a reference to the Master, an advance out of a capital sum, being the inheritance, the interest of which was insufficient, coming to a minor proceeding to Europe for his education.

1838 May 30. — *In re* Fehrzen.

Sir John Truter, as tutor of Fehrzen, applied to the Court to sanction his advancing part of the capital of the minor, in order to enable him to proceed to Europe for his education, the interest being insufficient for that purpose.

In respect of the circumstances set forth in the affidavit filed by the tutor, the Court (Wylde, C.J., absent) were

1835.
May 30.

In re Fehrzen.

of opinion that the advance suggested by the tutor was for the advantage of the minor; and in respect of the authorities stated in *Voet*, 27, 2, 2; 27, 9, 8, held that they were authorized and required to interpose their authority, and referred to the Master to ascertain and report the amount of the advance which would be necessary for the proposed purpose.

DAY *vs.* GRAY, ASSISTED BY HER HUSBAND, AS TUTRIX OF HER DAUGHTER, A MINOR.

1836.
Feb. 25.

Day *vs.* Gray, assisted by her Husband, as Tutrix of her Daughter, a Minor.

The plaintiff's declaration set forth that, by a notarial deed dated 9th January, 1835, the plaintiff agreed to sell, and the said S. D. Gray, wife of the said J. J. Spengler, agreed to purchase a house, &c., &c., belonging to the plaintiff for the price of 45,000 *f.* That the defendant has, therefore, taken possession of the said house, &c., but has refused to receive transfer thereof, or to take over the sum of 16,000 *f.*, for which the said house is mortgaged to the Orphan Chamber, and to pass a bond for the remainder of purchase money in terms of the said notarial deed. Whereupon, an action has accrued to the plaintiff to claim that the defendant, S. D. Gray, as mother and guardian of her minor daughter, E. D. Davy, if need be assisted by her said husband, J. J. Spengler, be condemned to receive legal transfer of the said house, &c., and to take over the said mortgage bond for the remainder of the price, being 29,000 *f.* with interest, &c., and costs. Wherefore, &c., &c.

In her plea, the defendant pleaded that she ought not to be condemned as in the said declaration is prayed, because she denies all the matters and things in the said declaration alleged, and thereupon joins issue.

This day, the plaintiff put in the said notarial deed of sale and purchase, dated 9th January, 1835. On reading which the Court absolved the defendant from the instance with costs, in respect that in this action the minor herself was not called as a party, and that the conclusion of this action to complete the sale was directed solely against the defendant as guardian, who in the said notarial deed, on which this action is founded, is only stated to have appeared as *assisting the minor, to whom personally* the sale is therein stated to have been made.

In Re Trueman.

Minor, maintenance of.

Where the paternal uncle, himself being one of the tutors dative of a minor, offered jointly with the paternal grandmother to maintain a minor, five years old, at their own charge, the Court refused to make an order on the tutors dative to pay the interest of the minor's paternal inheritance to his mother, with whom he lived, for his maintenance, the mother having re-married and being in good circumstances.

1836. Feb. 25. — *In re* Trueman.

In this case, the Court refused to make an order on the tutors dative of a minor of five years old, to pay the interest of the minor's paternal inheritance (of which the capital was £280) to his mother, with whom he lived, for his maintenance, &c., &c., the mother having re-married and being in good circumstances, and one of the tutors dative, the paternal uncle, resisting the application, and offering jointly with the maternal grandmother, with whom he resides, to maintain in his family the minor for the next five years at their own charge and without any cost to the minor.

No costs to either party.

Riggs *vs.* Calff.

Mother, natural guardian, action by, for recovery of child. Apprenticeship of minor.

Indentures of apprenticeship of a minor are null and void if not signed by his widowed mother and natural guardian. Proceedings by which the Court appointed a third party guardian, on affidavit that the mother had extra-judicially consented, declared invalid on action brought by the mother for the restoration of her child, on the ground that she had not judicially consented to those proceedings.

Nov. 22. — Riggs vs. Calff.

On the 27th June, 1834, a memorial was presented to the Court by Ewan Christian, Esq., for himself and in the name of certain other persons styling themselves the Committee of Management for and on behalf of certain juvenile emigrants recently brought to this Colony, which set forth that the Committee of Management of the society established in London, has shipped to this Colony as emigrants,

Harriet Caroline Riggs and fourteen other girls and boys (whose names and ages were set forth) as emigrants, consigned solely to the care and management of the memorialists, for the purpose of being indentured out as apprentices for certain periods, under such conditions as might be found proper. That these girls and boys arrived in the Colony on the 26th June, and were delivered over to the memorialists. That the memorialists, in prosecution of the purpose for which these girls and boys were sent out, intended to apprentice them under legal indentures. But as they were without parents or natural guardians within this Colony, they will be left insufficiently protected as to their personal interests, unless legal guardians and curators in that respect be appointed, under and by virtue of the authority of the Supreme Court.

The memorialists therefore prayed that the Court may appoint the memorialists, as forming the said committee, guardians and curators of the said minors, with all such powers and privileges, and subject to such liabilities and responsibility, as in law or equity may attach to such their appointment.

Thereupon, by an order dated 27th June, 1834, the Court appointed Mr. Advocate Cloete to be *curator ad litem* to the above-named minors, who, on the 30th June, 1834, reported to the Court that he had personally examined the condition of the said minors, who severally stated themselves to be unprotected by any parents, natural guardians, or near relations, except G. J. Riggs, aged seventeen, M. Riggs, aged fifteen, Harriet Caroline Riggs, aged ten, and G. Riggs, aged twelve, whose mother, being present with them, and a widow, expressed her consent to have her said children placed under the guardianship of the said committee, and that he, the *curator ad litem*, considered the said committee fit and proper persons to act as guardians over the persons of those minors during their legal minority.

Whereupon the Court, by an order dated 30th June, 1834, appointed the said committee guardians as prayed.

Thereafter, on the 1st July, 1834, the said Ewan Christian, acting by the authority and in the name and on behalf of the said committee, and as such duly appointed superintending guardian of the said Harriet Caroline Riggs, indentured her by a regular indenture as an apprentice to the defendant for the term of nine years to be instructed as a house servant, under certain conditions therein set forth.

Thereafter, on the 6th October, 1836, the present action was commenced at the instance of the said H. C. Riggs, assisted by G. J. Emery, widow of the late T. Riggs, as her mother and natural guardian.

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Nov. 22.
—
Riggs vs. Calff.

The declaration set forth that the defendant had, since the 18th September, 1836, wrongfully kept and imprisoned and detained in his house the plaintiff against her free will and consent, and still does so, and refuses to permit her to depart therefrom; wherefore the plaintiff, assisted as aforesaid prayed that the defendant may be condemned to pay her £100 as damages, and may be decreed to permit her to depart whithersoever she pleases, and to pay the costs of suit.

The defendant in his plea set forth the memorial, the orders of the Court made thereon, and the indenture, all above mentioned, and that by virtue thereof he, the defendant, had kept and detained the plaintiff in his house and service as complained of in the declaration, and pleaded that by reason of the premises, the plaintiff ought not to have her remedy as sought by her in this action.

At the trial, the defendant put in all the documents and proceedings mentioned in his plea.

The plaintiff admitted the order of the Court, and that the documents produced were those in respect of which the order was made, but did not admit the truth of the allegations in those documents. It was admitted that the mother was in this Colony on and before the 27th June and the 1st July, 1834.

After hearing the Counsel for the parties, the Court held that as the mother, the natural guardian of the child, had not signed the indentures of apprenticeship, the indentures were null and ineffectual as a defence against the present action, unless the mother had previously been duly removed from the guardianship, and the committee duly appointed guardians, and that the mother having been in the Colony, no order removing her from the guardianship, or appointing others as guardians, could legally be made, unless after legal proceedings to which she had duly and regularly been made a party, and that no allegation, however credible or capable of being proved, that she had extra-judicially consented to the appointment of the committee as guardians, could remedy the defect occasioned by the want of her judicial consent, or of the order having been made in respect of proceedings to which she had not been made a party, and gave judgment for plaintiff; damages one shilling. Each party to pay their own costs, and decreed the defendant forthwith to give up plaintiff to her mother.

South African Association, Tutors of H. C. Voget, *vs.* The Executors of the Widow Voget.

Ordinance 105, *sec.* 6. *Exceptio non qualificatæ. Title to sue.*

No valid appointment can be made of tutors dative to a minor out of the Colony and the jurisdiction.

1837. Sept. 7.

South African Association, Tutors of H. C. Voget, *vs.* The Executors of the Widow Voget.

The declaration set forth that this action was brought by the plaintiffs, in their capacity as tutors dative of H. C. Voget, jun., a minor son and only legal heir of J. H. Voget, one of the legal heirs of H. C. Voget, sen., against the defendants, as executors and representatives of the Widow Voget, sole executrix of the said H. C. Voget, sen., in order to have the liquidation account of the estate of the said H. C. Voget, sen., made by his said widow and executrix, dated 30th September, 1814, opened up and amended, in respect that the said executrix had omitted to credit the joint estate of herself and deceased husband with three bonds belonging to the said estate.

The defendants filed an exception to the declaration, in which they denied that, on account of the said pretended errors or omissions in the liquidation account dated 30th September, 1814, the plaintiffs, as tutors dative to the said H. C. Voget, jun., have become and are by law entitled to demand from the executors aforesaid to have the said liquidation account opened up and amended, for that when the said J. H. Voget died *ab intestato* on or about the 2nd May, 1827, and left as his legal and only heir his son, the said H. C. Voget, jun., the late Board of Orphan Chamber, by virtue of the laws in force in this Colony, became the administrators of his estate and guardians over his minor heir, whose authority at the abolition of the said Board was transferred to the Master of the Supreme Court, who still is the guardian of plaintiffs' ward in respect of his paternal inheritance aforesaid, and is not superseded in that capacity by the appointment of the plaintiffs as tutors dative.

For these reasons, the defendants proposed the exception of non-qualification, and prayed that they might be absolved from the instance with costs.

This day, the plaintiffs put in letters of administration granted by the Master of the Supreme Court, dated 9th September, 1836, appointing them tutors dative of the said H. C. Voget, jun.

De Wet, for the defendants, was heard in support of the exception, and it being shown that, at the time the plaintiffs were appointed tutors dative to the minor, he was, and still is out of the Colony, and beyond the jurisdiction of the

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Charter and of the Court, and consequently that no such appointment of tutors dative could validly be made under the provisions of the 6th section of the Ordinance No. 105.

The Court therefore held that the plaintiffs had no title to sue in their capacity as tutors, and absolved the defendants from the instance with costs.

MUNNIK *vs.* NEETHLING, EXECUTOR OF MUNNIK AND GUARDIAN OF ESTATE OF HIS MINOR HEIRS.

Tutor, powers of. Liability of, for maladministration.] *Liability of, for improper cancellation of a bond.*

1838. Aug. 21.

Munnik *vs.* Neethling, Executor of Munnik and Guardian of Estate of his Minor Heirs.

In this case, the Court decided—1st. That where a father, as being a natural guardian of his minor children, who were heirs of the estate of A, deceased, had by his signature confirmed an account of their administration of said estate of A, made up by A's executors, and who were also, in so far as related to the minors' shares in said estate, guardians of the property of the said minor heirs, such confirmation does not bar the said heirs after majority from objecting to the correctness of the items in that account in settling with the said executors and guardians. 2ndly. That where the guardian had sold immovable property of minors for a price payable by instalments, he is not entitled to debit the estate of the minors with discount allowed by him to the purchaser for payment of the instalments before they were due, where said price was not required to pay debts due by the estate, except in so far as he shall give credit to the estate for interest or other profit made on the price before the date when the instalments became due. 3rdly. A guardian who cancels a mortgage-bond justly due to the estate of the minors thereby renders himself personally liable to his wards for such amount as shall be proved to have been lost to the estate by reason of such cancellation, even although it were made at the request and with the consent of the father, and as such, the natural guardian of the minors, and with the consent of both their grandmothers, as being their two nearest relations.

The cancellation in this case was made in favour of the father, the debtor in the bond.

BRINK, Q.Q. ELY, HUSBAND OF MAYNIER, *vs.* SMUTS.

Superintending guardian appointed by Kinderbewys. Liability of, for the deficiency incurred by the administrating guardian, being the surviving husband, with maker of the Kinderbewys, the father and natural and testamentary guardian of the minors.

Pleading. Declaration bad for want of sufficient statement of the cause of action.

1838. Aug. 23. 1839. Feb. 19.

Brink, q.q. Ely Husband of Maynier, *vs.* Smuts.

N. F. W. Maynier and his first wife, Van der Byl, executed a mutual will, by which the predeceasing spouse instituted the survivor to be his or her sole and universal heir of the property which should be left by the predeceasing spouse to be entered upon and for ever possessed by the survivor as her own and allodial property, provided that the survivor should be bound to educate and maintain the children of the spouses until their majority or marriage, when to each of them shall be paid in lieu of the paternal or maternal inheritance, as the case might be, such sum as the survivor shall conscientiously, and, according to the condition of the estate, find to be proper, but in the event of the survivor being inclined to enter into a second marriage, he shall be bound before the consummation thereof to elect and appoint two good and unexceptionable men as superintending guardians over the said inheritance, without, however, being obliged to pay out the inheritance of the minors sooner than before stated; but it shall remain in the possession of the survivor, it being the express will and desire of the testators that the survivor shall remain with full and undisturbed possession of the estate, in order from the usufruct of their inheritances the better to educate and maintain the minors until the period stated.

The testators also appointed the survivor to be executor of the will, as also guardian over their surviving minor heirs, and desired that no person else should meddle with their estate and minor heirs, excluding, &c.

N. E. van der Byl predeceased her husband, Maynier, who, before entering into a second marriage, caused the whole of the joint estate of himself and deceased wife to be inventoried and appraised by "and in the presence of R. and B., and the defendant," who (it is stated at the end of the inventory), at her request, kindly took upon themselves the guardianship of his children.

This inventory and appraisement showed the net balance of the estate, after deducting debts, to be 130,721*f.*, one-half of which, 65,360½*f.*, belonged to the survivor Maynier, and

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the other formed the estate of his predeceased wife, divisible in equal shares between her husband and four children.

On the 19th April, 1827, Maynier duly executed a notarial deed of Kinderbewys, setting forth the will and the making of the inventory and appraisement, and renouncing his right to a child's share of his deceased wife's estate, &c., awarded as the maternal inheritance to each of his five children herein named the sum of 13,072*f.* = £326 16s., or to all five together a sum of 65,360*f.*, and nominated and appointed the defendant and the said R. and B. as superintending guardians over the same, giving and granting to them all such powers and authorities as appertain to superintending guardians, particularly the power of assumption and surrogation, who thereupon declared to accept the trust, promising to conduct themselves therein in such manner as is consistent with the duty of superintending guardians.

On the 5th June, 1834, Maynier surrendered his estate as insolvent, and the amount of maternal inheritance due to his children was duly proved on his insolvent estate. The plaintiff Ely subsequently married one of those children, and became entitled to demand her share. Upon the liquidation of Maynier's insolvent estate, a sum of £853 17s. 1½d. was proved to be deficient and unsatisfied to the said children, whereof one-fifth, or £168 15s., was thus due and owing to the plaintiff as husband of his said wife.

Plaintiff thereafter brought this action against the defendant, and in his declaration set forth the above facts, and then proceeded as follows: "So that the plaintiff has still to claim £168 15s., as being unsatisfied of his wife's maternal inheritance, for one-third thereof, viz., £56 3s. 9d., the said defendant is liable as such superintending guardian, he, the plaintiff, having his remedy against the two other co-superintending guardians for their respective one-third shares on such deficiency; wherefore the plaintiff claims that the defendant be adjudged to pay to the plaintiff the said sum of £56 3s. 9d., being one-third part of the loss sustained by plaintiff's wife upon the maternal inheritance due to her out of the said insolvent estate, and for the securing whereof the defendant bound himself as one of the superintending guardians."

To this declaration the defendant excepted, on the ground that there was not in all or any of the counts thereof any cause of action shown or stated by or for the plaintiff to maintain his action against the defendant, and the Court allowed the exception, with costs.

Thereafter plaintiff filed another declaration, in which, after setting forth all the facts and the deficiency above mentioned, he alleged "that by reason of the said deficiency

in the said insolvent estate, &c., an action has accrued to plaintiff to have and demand from said defendant, in his capacity as one of the superintending guardians of the maternal inheritance so due to his said wife, the amount of the deficiency so left unsatisfied, the said defendant as such superintending guardian being deemed in law to be liable as surety to such minors for whatever sum there may remain due and unpaid to them after the excussion of the administering guardian, &c., one-third of which deficiency, or £56 3s. 9d., plaintiff, reserving his remedy against the other two superintending guardians, has now demanded from defendant," &c.

"And as for a further ground of action, the plaintiff says that the defendant, jointly with two other persons, at the request of Maynier, became the appraiser of the property, so as to ascertain the amount of maternal inheritance of his said minor children, and that in that appraisement they valued the place called Boshheuvel at and for a sum of 80,000*f.*, which said place, &c., had been purchased by said Maynier from his father, the late H. C. D. Maynier, on the 23rd September, 1822, and that the said defendant neglected to have the said place transferred to the said N. W. C. Maynier, or to secure the value thereof on behalf of the said minor heirs, by reason of which neglect the said place was mortgaged for other debts due by the said H. C. D. Maynier, and the value or the amount of the proceeds of the said place was not accounted for or belonging to the estate of the said H. F. W. Maynier, to the injury of the said minor heirs, who would and might otherwise have been paid and satisfied out of the proceeds of the said place. By reason of the said neglect the plaintiff is furthermore entitled to claim the amount of damage sustained by his said wife by reason of such neglect of the said defendant and her co-superintending guardians, and upon these summary grounds the said plaintiff claims," &c.

In his plea to the first count, defendant admitted all the facts set forth in that count, but denied "that plaintiff has a right to claim and demand from him the amount of maternal inheritance due to his said wife, and that defendant is deemed in law liable as surety to the minors, for whatever sum there remains due and owing to the said minors after the excussion of the administering guardian." And as to the second count, he denied all the allegations therein set forth, and joined issue thereon.

From the inventory and other documents put in, and the evidence of the witnesses called by the parties, it was proved that at the time the inventory was made, Maynier had paid to his father no part of the 80,000*f.*, which was

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the price agreed to be paid by him to his father for Boshheuvel, which he had purchased in 1822 and had actual possession of since September, 1823. That in the inventory, while the joint estate was credited with 80,000*f.* as being the value of Boshheuvel, it was debited with 80,000*f.* as the price due for it to the father, with two years' interest thereon.

That Maynier's second wife, previous to her marriage with him in 1827, executed a deed of Kinderbewys in favour of her children by her first marriage, in which Mr. Crozier was appointed their superintending guardian; that he applied to Maynier to give security in their favour by mortgaging Boshheuvel; that Maynier, as attorney for his father, and with his father's knowledge and consent, executed a mortgage deed over Boshheuvel in favour of Crozier, dated 28th September, 1830; that Maynier, as attorney for and with consent of his father, had previously executed two mortgage bonds over Boshheuvel; the first, dated 29th January, 1830, in favour of Col. Kenny, for £375, being an old debt due by Maynier himself and not by his father; and the second, dated 9th July, 1830, in favour of A. Brink, for £625, also a debt due by him and not by his father.

That if Maynier had previously to 1830 been called on by defendant or his co-superintending guardian to have granted a mortgage on Boshheuvel in favour of his minor children, he would have had no objection to do so, and he believed his father would have consented to his doing so.

That Maynier, the father, had died intestate, and that his estate had been surrendered insolvent by the executor dative about a year after Maynier's own estate had been surrendered.

That in the estate of his father Maynier was debited with 80,000*f.* as the price for Boshheuvel. That the creditors in the above three bonds proceed for their amount in the father's estate; that the place was sold by the father's trustee, by direction of his creditors, on account of the son, and the net proceeds, after deducting expense of sale, amounted to £3,387, out of which the said mortgage bonds and other preferent debts on Boshheuvel, amounting in all to £2,636, were paid, and the balance, £751, was credited to Maynier in his father's estate. That Maynier, after giving him every credit which he could claim was indebted to his father's estate in the sum of £280, which Maynier's estate was wholly unable to discharge.

This day *et postea* (23rd Aug., 1838; 19th Feb., 1839), *Cloete* argued in favour of the defendant's liability on both the grounds stated in the declaration, and quoted *Van Leeuwen's Cens. For.*, 1, 18, § 10; *Dutch Consult, vol.* 6,

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p. 332, 3rd *vol., p.* 46; *Voet*, 27, 3, 6, 27, 8, 6, 24, 3, 33, 26, 10, 2; *Kesleman's Manual, pp.* 325, 332; *Van Leeuwen's Roman-Dutch Law, p.* 98; and *Van der Linden's Inst. in the Dutch, pp.* 103 and 104; and maintained that the two last passages apply only to guardians appointed by the operations of the law, and not to guardians, as in the present case, expressly appointed by the provisions of the will; that the defendant was a superintending guardian, *tutor honorarius*, and not the guardian referred to in the above passages of *Van der Linden*, who is only appointed to see the inventory and taxation properly made; that a superintending guardian is liable for such part of the loss sustained by the minors as cannot be recovered from the administering guardian, and which has been occasioned by the culpable neglect and mismanagement of the latter. (*Lybreght on Notaries*, 1, 488, *2nd*, 34.) That in this case the amount sued for had been lost to the minors by the mismanagement and improper conduct of their father, the administering guardian, in neglecting to have the estate of Boshheuvel registered as his property, and so bringing it under the Kinderbewys; and therefore that the defendant is liable to make good the loss, the father's estate having been fully excussed.

De Wet and *Denyssen* argued *contra*, and quoted *Van der Linden, ut supra*, 103; *Voet*, 24, 3, 33, 26, 7, 1, 27, 8, 6; *Institut.* 1, 24, *Initio; Noodt's Commties.* 26, 5, *p.* 431.

The Court gave judgment for defendants, with costs.

HURTER, APPELLANT; ISAAC, RESPONDENT.

Minors, apprenticeship of.

1842. May 12.

Hurter, Appellant; Isaac, Respondent.

This was an appeal against a sentence of the Resident Magistrate of Graaff-Reinet, in which the respondent was plaintiff, and the appellant defendant.

The crime or offence charged was "that defendant being about to remove and to take up his permanent residence at Uitenhage, and to take with him two children of the said Isaac, who were indentured to him here on the 31st August, 1840 (the one, named Isaac, for five years, to learn the trade of a wagon-maker, and the other, named Eva, for four years, to learn the business of a house-servant). Plaintiff claims that, in consequence of the intended removal of defendant to Uitenhage, the said indentures may be cancelled, and the said two children, Isaac and Eva, restored to him."

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May 12.

Hurter, Appellant; Isaac, Respondent.

Defendant had appeared before the Magistrate, and admitted his intended removal to Uitenhage that day; but by virtue of the indentures, claimed the right to take these children with him, and to retain them until the expiration of the periods respectively stipulated by the indentures.

Sentence of the Magistrate: The indentures to be annulled, and the children, Isaac and Eva, to be restored to the plaintiff as the father.

The Court held it was clear that the Resident Magistrate had no jurisdiction to cancel the indenture; and reversed the sentence and dismissed the complaint; but without giving any decision as to the jurisdiction of the Resident Magistrate to prevent the removal of the children from Graaff-Reinet, the residence of their parent, without his consent, until the question as to the right to remove them with him to Uitenhage be decided by the judgment of a competent Court.

The Court also held that this case was of a civil nature, and did not fall under the criminal jurisdiction of the Resident Magistrate.

ELLIOTT'S TRUSTEES *vs.* ELLIOTT AND HIS CURATOR AD LITEM.

What constitutes a valid donation as against creditors by a father to his minor child. The donation in the present instance, consisting of the amount of £500, secured by bond of the father's debtor for money lent in favour of the father as father and natural guardian of his minor son, specially mortgaging the debtor's immovable property, was held good: the Court being satisfied that the father was perfectly solvent at the date of the bond—that when he lent the money to the debtor and took his bond, he intended to make an irrecoverable donation in favour of the son; that the receipt of the money by the debtor on condition of his granting the bond payable to the father, as father and natural guardian of the minor, and the execution of the bond before the Registrar of Deeds, were in law acts of acceptance on the part of the minor sufficient to support the donation until the minor at his majority should be enabled to ratify it; that the taking of the bond, in the manner in which it was taken, with its execution and registration coram lege loci, was acceptance in law by the father on behalf of the minor; that even if the donation were one beyond 500 aurei, the execution of

the bond coram lege loci and its registration was a sufficient registration of it; and that the delivery of the amount to the debtor on condition that he would grant his bond in favour of the father as father and guardian was a sufficient delivery of the subject-matter of the donation to transfer it to the minor, and vest him with the jus in re.

There is nothing contrary to public policy in permitting a solvent father to make a donation to his minor child by deed executed openly coram lege loci, and registered in the public registry of deeds.

1845. Dec. 10.

Elliott's Trustees vs. Elliott and his Curator ad litem.

The declaration in this case set forth that the insolvent, John Wilkinson Elliott, on the 14th July, 1837, lent £500 to Forbes Still, who, for securing the repayment thereof, on the same day executed a mortgage bond in which he acknowledged himself to be indebted in the said sum to the said J. W. Elliott, as father and guardian of J. F. Elliott, the defendant; and for the security of the said sum mortgaged certain inmovable property in Graham's Town; that the said sum of £500 so lent was the proper money of J. W. Elliott, and that the defendant, who was then under eight years old, and living with his father, J. W. Elliott, never had any right or title to the same, or any part thereof; that the said mortgage bond was executed solely by the desire and request of the said J. W. Elliott, and for the purpose as alleged by him, of making a donation or gift of the said sum so secured to the said defendant; that on the 29th April, 1843, the estate of the said J. W. Elliott was duly surrendered as insolvent, and on the 10th of June, 1843, the plaintiff was duly confirmed as trustee thereof; that from the date of the execution of the bond down to the surrender of his estate, J. W. Elliott retained and had the sole and exclusive possession of the said bond, which was during all the said time in his order and disposition; that the said bond and all the money secured thereby was by law claimable by and on behalf of the creditors of the insolvent estate of J. W. Elliott upon the sequestration thereof, on the following grounds,—namely that J. W. Elliott is not, and never has been, the guardian of the said J. F. Elliott, and could not by law both make and accept his own donation; and, therefore, that there was no valid acceptance of the said alleged donation by or on the part of the said minor; that notwithstanding anything done in regard to the said loan of money and the form of the mortgage bond taken for securing the repayment thereof, and even if J. W. Elliott intended a *bonâ fide* benefit to his said minor son, he had at the time of his

1842.
May 12.

Hurter, Appellant; Isaac, Respondent.

Defendant had appeared before the Magistrate, and admitted his intended removal to Uitenhage that day; but by virtue of the indentures, claimed the right to take these children with him, and to retain them until the expiration of the periods respectively stipulated by the indentures.

Sentence of the Magistrate: The indentures to be annulled, and the children, Isaac and Eva, to be restored to the plaintiff as the father.

The Court held it was clear that the Resident Magistrate had no jurisdiction to cancel the indenture; and reversed the sentence and dismissed the complaint; but without giving any decision as to the jurisdiction of the Resident Magistrate to prevent the removal of the children from Graaff-Reinet, the residence of their parent, without his consent, until the question as to the right to remove them with him to Uitenhage be decided by the judgment of a competent Court.

The Court also held that this case was of a civil nature, and did not fall under the criminal jurisdiction of the Resident Magistrate.

ELLIOTT'S TRUSTEES *vs.* ELLIOTT AND HIS CURATOR AD LITEM.

What constitutes a valid donation as against creditors by a father to his minor child. The donation in the present instance, consisting of the amount of £500, secured by bond of the father's debtor for money lent in favour of the father as father and natural guardian of his minor son, specially mortgaging the debtor's immovable property, was held good: the Court being satisfied that the father was perfectly solvent at the date of the bond—that when he lent the money to the debtor and took his bond, he intended to make an irrecoverable donation in favour of the son; that the receipt of the money by the debtor on condition of his granting the bond payable to the father, as father and natural guardian of the minor, and the execution of the bond before the Registrar of Deeds, were in law acts of acceptance on the part of the minor sufficient to support the donation until the minor at his majority should be enabled to ratify it; that the taking of the bond, in the manner in which it was taken, with its execution and registration coram lege loci, was acceptance in law by the father on behalf of the minor; that even if the donation were one beyond 500 aurei, the execution of

the bond coram lege loci and its registration was a sufficient registration of it; and that the delivery of the amount to the debtor on condition that he would grant his bond in favour of the father as father and guardian was a sufficient delivery of the subject-matter of the donation to transfer it to the minor, and vest him with the jus in re.

There is nothing contrary to public policy in permitting a solvent father to make a donation to his minor child by deed executed openly coram lege loci, and registered in the public registry of deeds.

1845. Dec. 10. — Elliott's Trustees vs. Elliott and his Curator *ad litem*.

The declaration in this case set forth that the insolvent, John Wilkinson Elliott, on the 14th July, 1837, lent £500 to Forbes Still, who, for securing the repayment thereof, on the same day executed a mortgage bond in which he acknowledged himself to be indebted in the said sum to the said J. W. Elliott, as father and guardian of J. F. Elliott, the defendant; and for the security of the said sum mortgaged certain inmovable property in Graham's Town; that the said sum of £500 so lent was the proper money of J. W. Elliott, and that the defendant, who was then under eight years old, and living with his father, J. W. Elliott, never had any right or title to the same, or any part thereof; that the said mortgage bond was executed solely by the desire and request of the said J. W. Elliott, and for the purpose as alleged by him, of making a donation or gift of the said sum so secured to the said defendant; that on the 29th April, 1843, the estate of the said J. W. Elliott was duly surrendered as insolvent, and on the 10th of June, 1843, the plaintiff was duly confirmed as trustee thereof; that from the date of the execution of the bond down to the surrender of his estate, J. W. Elliott retained and had the sole and exclusive possession of the said bond, which was during all the said time in his order and disposition; that the said bond and all the money secured thereby was by law claimable by and on behalf of the creditors of the insolvent estate of J. W. Elliott upon the sequestration thereof, on the following grounds,—namely that J. W. Elliott is not, and never has been, the guardian of the said J. F. Elliott, and could not by law both make and accept his own donation; and, therefore, that there was no valid acceptance of the said alleged donation by or on the part of the said minor; that notwithstanding anything done in regard to the said loan of money and the form of the mortgage bond taken for securing the repayment thereof, and even if J. W. Elliott intended a *bonâ fide* benefit to his said minor son, he had at the time of his

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insolvency the power by law to recover the said sum and revoke the intended gift thereof. That even although J. W. Elliott, if he had remained solvent, could not have revoked the said intended gift, but might have been compelled by legal process to fulfil it, yet the defendant would by law have had only a right of action to compel such fulfilment, and is therefore only a concurrent creditor of the insolvent estate of his father; that the absolute ownership and administration of the money lent, down to the loan thereof, and of the right of action taken and received in security of the repayment of the said loan, was never at any time, down to the sequestration of his estate as insolvent, out of the said J. W. Elliott, so that the right of the said minor, if any, to the said sum of £500 was never *jus in re*, but only *jus ad rem;* that the said alleged donation was made without the intervention of any second person as trustee for the minor, and without any public or notarial record of it; that all donations, or intended or pretended donations, made or sought to be made by fathers, merely by taking securities for their own advances to themselves, as father and guardian of their minor children under their roof and power, who are alike incapable of accepting such donations and ignorant of their existence,—are, upon principles of public policy, invalid against the creditors in the insolvent estates of such fathers.

The declaration further set forth that, after the plaintiff had claimed the said bond for the benefit of the creditors of J. W. Elliott, in consequence of the said F. Still, the debtor in it, having contracted for the sale of the property in Graham's Town therein mortgaged to one Henry Blaine,—an order had been made by the Court, by consent of the plaintiff and defendant, that the said bond should be cancelled, and that another bond specially mortgaging the same property for the sum of £500 should be executed in favour of the said F. Still by the purchaser; and that this new bond should be ceded by the said F. Still to the said J. W. Elliott, as father and guardian of his minor son, the defendant, in which act of cession the said F. Still should bind himself as surety and co-principal debtor for the payment of the said £500; that, accordingly, the said bond of the 14th July, 1837, had been cancelled, and a new bond, dated 25th April, 1845, had been executed by the purchaser in favour of Still, and ceded by the latter to J. W. Elliott, as father and guardian of his son, in terms of the said order of Court; whereby the said last-mentioned bond of the 25th April came in the place of, and became liable to the same objections, in all respects, as the bond of the 14th July, 1837.

Wherefore the plaintiff prayed that the said bond may be declared not to be the property of the defendant, and that the plaintiff in his said capacity of trustee may be declared to be entitled to it for distribution among the creditors of the insolvent estate of J. W. Elliott.

The defendant pleaded the general issue.

At the trial the defendant admitted that the sum of £500 paid by J. W. Elliott to Forbes Still, and in respect of which the bond dated 14th July, 1837, was executed, was the proper money of the said J. W. Elliott; that the defendant, the son of the said J. W. Elliott, then was and still is a minor; and that the counterpart of such bond remained in the possession of the said J. W. Elliott down to the surrender of his estate as insolvent, and subsequently.

The plaintiff admitted that J. W. Elliott was perfectly solvent and possessed property to the amount of £1,000 and upwards on the 14th July, 1837, when the money was lent to Still, and the bond for it passed in favour of J. W. Elliott, as father and guardian of his minor son the defendant.

The *Attorney General*, for the plaintiff, quoted *Van der Linden's Institutes (English Ed.), p.* 213, 214; *Grotius, Inleid.*, 3, 2, § 8; *Voet*, 39, 5, § 6; *Dutch Consultations, vol.* 1, *c.* 120, *in fine; Gail's Practyk Observ.*, 38, *No.* 3; *Huber's Prælect.*, 2, 7, § 6; *Lybreght's Notar. Practyk*, 1, *p.* 207; to show that, according to the civil law, a father could in no way effectually make an irrevocable donation to his minor child under puberty and *in familiâ;* but admitted that,—in the face of the following authorities,—*Van Leeuwen, Cens. For. P. L. l.* 4 *to* 12, § 8; *Groenewegen de Leg. Abr.*, 3, 20, § 6; *Pape's Observ. on the Dutch Consult., p.* 145; *Schorer's Note to Grotius*, 3, 2, § 8; *Rozeboom's Recueil, cap.* 39, § 7; *Van der Keessel, Thes.* 485,—he could not now maintain, as a general proposition, that by the law of Holland, and of this Colony, a father cannot, in any way, effectually make an irrevocable donation to his minor child *in familiâ;* but he maintained that in the present case the alleged donation was ineffectual on the following grounds:

1st. That there was no sufficient act of donation made or done by the father which was capable of being accepted as a donation by his son, or by any person for the son; that there was no evidence of the father's intention to make an irrevocable donation (which must be proved before an effectual acceptance of the donation would take place), except that furnished by what he actually did, viz., handing over the £500 to Mr. Still, and taking the bond payable to himself as father and guardian, which in itself afforded no proof whatever of any such intention; that in the most favourable view

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of the case for the defendant, the bond can only be considered as made payable to the father as the trustee of his son, and that if A lends £500 of his own money to B, and takes a bond from B, payable to A, as trustee for C, and retains the bond in his possession,—that would not *per se* constitute an irrevocable donation by A to C; that the intention to make a donation is not to be presumed, but must be clearly shown and proved by something intrinsic of, or extrinsic to, the alleged act of donation; and that from such an act as that supposed in the case last put, there arises no presumption of an intention to divest A of his property in the £500, and transfer it to C (*Voet*, 39, 5, 5); and more especially that in the present case the father had, from the nature of the act done by him, retained,a power of undoing the act of donation whenever he chose.

2nd. Because there was in this case no sufficient act of acceptance, by the son, of the donation, even supposing that an intention on the part of the father to make an irrevocable donation had been proved; that the consent of two wills, viz., of the donor and donee, is absolutely essential to the validity of a donation. (*Pothier on Donation, p.* 1.) And that the consent of the donee to accept even the most beneficial and unconditional donation is not to be presumed. And that here there was no evidence of any act of acceptance of the donation on the part of the child, either direct or indirect.

He maintained that the father is not the tutor of his son unless either appointed or confirmed as such by the magistrate (*Voet*, 26, 4, 4). He admitted that the father might accept for his minor child a donation made to the child by a third party (*Lybreght, vol.* 1, *p.* 210; *Voet*, 39, 5, §§ 11—13), but maintained that in the nature of the present transaction there was nothing done by the father which can in law be construed to be an act of acceptance by the father, on the part of the child, of the donation, or to have been intended to have had the effect of such an acceptance.

He quoted *Sande's Fris. Decis.* 5, 1, *def.* 1,—and maintained that a father, by no act done by himself, can effectually accept for his minor son a donation from himself. (*Van der Keessel, Thes.* 485; *Voet*, 39, 5, 11; 41, 2, 14.)

3rd. Because, even if a sufficient effectual act of donation by the father, and of acceptance by, or on the part of, the son, had been proved, yet that there was no sufficient transfer or delivery to pass to the son the property in the subject-matter of the gift; so that by what had taken place only a personal right of action was created, and not a *jus in re* in favour of the son. (*Voet*, 41, 1, 34; 41, 2, 14.)

4th. He maintained that a transaction of the nature of that in question ought to be set aside on grounds of public policy, as dangerous to the interests of *bonâ fide* creditors. (*Mantica on Contracts*, 13, 18, § 15.)

Ebden, for the defendant, argued *contra*, and quoted *Blackstone's Commentaries*, *b.* 2, *tit.* 30, *vol.* 2, *p.* 441.

The Court held that the father's intention to make an irrevocable donation to his son at the time he lent the money to Still and took the bond was clearly proved by the nature of the transaction. It is impossible to infer from the circumstances of the case that he was influenced in what he did by any other motive than a desire and intention to make an absolute and unqualified provision to his son of £500. And after taking the bond from Still he did not retain, and could not afterwards have legally obtained, the power of appropriating the £500 to his own use. He could not effectually cede the bond even, on full value paid down to him by the cessionary—nor lawfully obtain payment of it from the debtor so as to discharge the debtor,—without the decree of the Supreme Court being first interposed. And at the same time of making such decree the Court would have provided that the money should be securely re-invested on behalf of the minor. (*Voet*, 26, 7, 8; 26, 8, 5.) It is true that by the ignorance and negligence of the debtor in the bond, or of a cessionary, the father might have obtained the amount of the bond and misappropriated it to his own use, and that by the subsequent insolvency of all the parties the minor might be unable to recover the amount from any one, —still that this misappropriation by the father, and the irremediable nature of the loss to the son, would not have been rendered possible, or have been occasioned, by the circumstance of his father having been the donor, and might as easily have happened if the donation to the son had been made by a stranger. It is impossible to presume that the father when he took the bond from Still intended afterwards to endeavour by an illegal act to obtain possession of and misappropriate the money lent.

The Court also held,—on the authority of *Voet*, 39, 5, §§ 12 and 13, that Still's receiving the money from the father on condition of his granting the bond payable to the father, as father and guardian of the minor,—and that the execution of the bond in the presence of the Registrar of Deeds, were in the estimation of law, acts of acceptance on the part of the minor of the donation, seeing especially that it was absolute and unconditional, and wholly and clearly beneficial to the minor,—either of which was in itself sufficient to support the donation until the minor on the attainment of his majority should be enabled to ratify such acceptance.

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They also held that the taking of the bond in the terms and form in which it had been taken, including its execution *coram lege loci*, and *registration*, was a sufficient acceptance by the father on the part of the minor to validate the donation.

They held that even if the donation should be deemed to be one above the value of 500 *aurei*, yet that the execution of the bond *coram lege loci* and its registration as a special mortgage bond, was a sufficient registration of it. (*Voet*, 39, 5, §§ 15, 16, 18.)

They held that the delivery of the £500 to Still on condition that he should grant his bond in favour of the father as father and guardian of the minor, was a sufficient delivery of the subject-matter of the donation to transfer it to the minor and vest him with the *jus in re*.

They held that there was nothing contrary to public policy, as being dangerous to *bonâ fide* creditors, in permitting a father, at a time when he was perfectly solvent, to make a provision for his minor child by a deed executed openly *coram lege loci*, and registered in the Public Registry of Deeds.—And therefore gave judgment for the defendant, with costs.

SECTION II.

CURATORS AND WARDS.

ZIEDEMAN EX PARTE ZIEDEMAN.

How to proceed to have insanity declared and curator appointed. 1831. May 10.

[Vol. I, p. 525.]

IN RE WIESE.—WIESE'S SONS *vs.* WIDOW WIESE AND HER CURATOR AD LITEM.

Insanity, what evidence of, sufficient to warrant appointment of curators.

1833. July 12.

In re Wiese.—Wiese's Sons *vs.* Widow Wiese and her Curator *ad litem.*

This was an application, at the instance of the sons of the Widow Wiese, to have her adjudged to be incapable of managing her affairs, and of unsound mind, and to have a curator or curators appointed for the care of her person, as well as for the administration of her estate.

The applicants called John Laing, M.D., who proved her incapacity; as did also Andries Wiese and Jan Wiese; but the woman seen by Dr. Laing was not identified to be the Widow Wiese.

The Court enlarged the rule till the first day of next term, and referred to the Master to inquire and to report to the Court both as to the state of her mind and as to the proper persons to be appointed her curators.

This day (1st August, 1833), the Master reported that the woman was in a state of idiotcy, and incapable of managing her own affairs, and reported that P. B. Wiese and N. J. Lotz were proper persons to be appointed curators.

Report confirmed, and those curators appointed.

In re Horak.—Horaks and Others *vs.* The Widow Horak.

Orphan Chamber [Master of Supreme Court] cannot be appointed curator bonis.

1833.
Aug. 15.
„ 20.

In re Horak.—Horaks & Others *vs.* The Widow Horak.

In this case, the Court had on the 6th August last, on the application of the plaintiffs, ordered that the estate of the late Horak be placed under the administration of a curator bonis, *pendente lite* between the parties respecting said estate, and had referred to the Master to report as to a proper person to be appointed curator.

This day the Master reported that Messrs. Christian and Gadney, who had been proposed by plaintiffs, were proper persons, but that defendant had objected, and insisted on the Board of Orphan Masters being appointed.

The Court held that it was not competent to appoint the Board of Orphan Masters to act as a curator bonis.*

Postea (20th August, 1833).—Messrs. Christian, Gadney, and Sandenberg were appointed curators.

The defendant to pay the costs.

Steyn *vs.* The Curators of the Widow Wiese.

Insanity, what not sufficient evidence of, to set aside deed.

Aug. 30. 1834.
Aug. 30.
Dec. 1.

Steyn *vs.* The Curators of the Widow Wiese.

On the 14th May, 1833, the plaintiff took out a summons against the widow Wiese (the same who, in the case reported *ante*, was, on the 1st August, 1833, declared of unsound mind and incapable of managing her affairs) to render transfer to him of the place Weltevreden, which, in his declaration, the plaintiff averred had been sold to him by the said widow for the sum of 20,000*f.* by a deed of sale executed by her in his favour on the 1st September, 1832.

After the now defendants in the case had, by the judgment of the Court, dated 1st August, 1833, been appointed the curators of the widow, they obtained an order of Court, by which they were substituted as the defendants in this case in the place and stead of the widow, and thereafter filed a plea, in which they admitted that, on the 1st September, 1832, the widow subscribed the deed of sale of

* The duties of the Board of Orphan Masters now devolve upon the Master of the Supreme Court, Orphan Branch.

that date set forth in the declaration, but averred that before and on the 1st September, 1832, and up to the present moment, the said widow was and still is of unsound mind, and unable to administer her estate or enter upon a valid contract or agreement, and that the said deed of 1st September, 1832, is consequently invalid, and not binding in law against her or the said defendants, and ought to be set aside accordingly.

In support of this plea the defendants called Anna, a slave of the widow's, Jan B. Wiese and Pieter B. Wiese, sons of the widow, who all swore that her husband had died in April, 1832, and that she had not been in her senses since his death (P. B. Wiese, sen.); that some days she was tolerably well, but at other times she was out of her senses; that when she was tolerable, she could comprehend a few things, but very little; that since his death she never had her senses sufficient to take any share in the direction of the business of the farm, or to enable her to understand the contents of a paper that she signed.

Jan B. Wiese swore that she was now exactly in the same state of mind that she was in after his father's death.

Anna went still further, and swore that for two months after her husband's death she kept her bed, without ever quitting the room, and did nothing but talk incoherently. I took charge of her all that time, night and day. After the two months she continued in the same state, rather worse than better. She remained always in the house, doing nothing else but sitting and crying. In this state she has continued ever since, up to the present day. At the time the deed was signed she was just as she had been since her husband's death—not in her senses, wringing or rubbing her hands. She is constantly in this state. Sometimes, indeed, she appears as if nothing was the matter with her, but before a person could turn round she again becomes so bad that she could not be safely trusted either with fire or water. I never suffer her to go out of the house herself. I take care to keep the doors and windows fast.

The defendants also called

John Laing, who swore: I am a surgeon. I examined the widow in July last, and came to the opinion that she was of unsound mind, and that she must have been for some months at least previously in the same state. The species of the mental disease appears to me to be *melancholia*, extending to fatuity, an unconsciousness of external objects, or a regardlessness of them. She appeared to me to be unable to take care of herself; even to dress or feed herself. I think she could not feed herself unless she was

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moved by others to do so. I think her present state may be accounted for by the sudden death of her husband, and that the shock of that event may have been sufficient at once to reduce her mind to its present state of *melancholia*. I think it more likely that the sudden death would produce the effect immediately.

Cross-examined: I think it unlikely that in April last she could have been able to defend a cause and cross-examine witnesses. She might, indeed, ask questions. It is possible that a person labouring under *melancholia* may be so excited and roused to act for a short time so as the mental disease cannot be detected.

Anna and Jan B. Wiese swore that the deed of sale was written by plaintiff's brother, Gabriel, by plaintiff's desire, in the house of the widow, and signed by her in their presence; that she did not read it, and that although it was read aloud to her by Gabriel, she said, "But what are the contents of it?—what does it mean? I don't understand it," and that on their urging her to sign it she remained silent, and only said "For what must I sign it?"

There were several discrepancies in the evidence of these two witnesses.

The plaintiff, in replication, called, *inter alios*, Gabriel Steyn, plaintiff's brother, who swore: Jan Wiese desired me to come to the widow's. I went. When I came, the widow requested me, with her own mouth, to write the deed of sale. She said if she remained in possession of the place she would go to ruin. She said nothing more. After she had read it to herself, and I had read it twice aloud, she signed it. Her son, John Wiese, and her daughter, Mrs. Karsten, were present. I found her on this occasion in the same state as she was in both before and after her husband's death. She appeared to be in the full possession of her senses when she signed the deed, and knew what she was about. She left the place about eight days after the sale. In my opinion, the bargain is not a good one for my brother. Mrs. Karsten made no objection to the transaction. I asked her where her mother was going to live. She said with her.

Hercules Tennant: I am Secretary to the Orphan Chamber, and as such held the sale of the deceased Wiese's estate on the 4th June, 1832. I arrived the evening before, and spent the night there. She certainly appeared dejected at his death, but seemed perfectly in her sound mind. She gave me a tolerably correct account of her husband's affairs, and was very desirous to purchase the place, but was afraid it would go too high. She wished a strip of land near its boundary to be taken off, and sold separately, so

that if she did not get the place she might live on it. She sat at supper, and during the whole evening and next day conducted herself like a woman in her sound senses. She purchased part of the property, and the remainder was appraised to her at her request. She gave 20,000*f.* for the place. Some months ago—I think in April—she came to me at the Orphan Chamber with her son Pieter. She asked me to write to Steyn, and try and induce him to give up his bargain. She was there about ten minutes. She spoke little; her son spoke most. She seemed much agitated, from which I concluded she was sane, as showing that she was sensible of the injurious nature of the sale. She said she had been out of her senses when she sold the place. She came a second time, accompanied by her slave, for the same purpose. She was also then agitated, but I perceived nothing like insanity.

Rynhard Clerk: I am clerk in the office of the Collector of Transfer Dues. In May last plaintiff came to pay the transfer dues on the place. The widow came after he had been waiting some hours; her son and Mr. Attorney Borcherds were with her. I told her plaintiff was waiting, and asked if she would sign her name and take the oaths. She said she would do nothing. She had not sold her place, and would not leave it. She appeared to me to be in her senses, and to understand what I said to her.

Frederick Dickenson: I am Clerk of the Peace at Stellenbosch. On the 5th April last a complaint was lodged with me by plaintiff against the widow, her two sons, and a daughter for having retaken forcible possession of the place. On the 11th April the case came on, and lasted half an hour. The defendants conducted their own case. The widow was present, and put several questions in cross-examination of the witnesses, and from beginning to the end of the trial nothing occurred to lead me in the least to conclude that she was not perfectly in her senses. After the Court was closed she came to my house with her daughter, and used every argument she could to induce me to obtain a mitigation of the fine. She was an hour with me, and pleaded poverty of herself and sons, and said she was not in her senses when she had sold the place, and for a month after she had left it was not aware that she was not still on it. She appeared to me perfectly sane. She had the principal part in the conversation, and was not checked by her daughter.

Frederick Basson: I know the widow, and she was my neighbour. Before the sale of the place to Steyn, she came to my house, which was not far distant from hers,

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and asked me for some advice, as she wanted to sell her place. I asked if she had a purchaser. She said that plaintiff was to be the purchaser. I said if you have a purchaser you had better sell. She spoke of 20,000*f.* as the price plaintiff was to give. She asked me if I thought she ought to sell. I said if she had got a purchaser she ought not to wait looking for another. I have had no intercourse with the Wieses for three years, except on the day when she asked my advice. She then appeared to be quite in her senses.

The Court were of opinion that the defendants had failed to adduce evidence sufficient to enable them to find that the widow was of unsound mind when she executed the deed, and gave judgment for plaintiff, with costs.

Postea (30th August, 1834).—The curator *ad litem* appointed by the Court to the Widow Wiese applied to have her person and estate relieved from curatorship on the ground of her recovery from her insanity.

Dr. Fleck and Attorney Borcherds, who had been applied to by her in May professionally to take steps for having her released from her curatorship, swore that she appeared to them to be perfectly sane, and in the full possession of her memory and all her other mental faculties.

N. J. Lotz, one of her curators appointed by the decree of the Court of the 1st August, 1833, swore: I saw the widow in December last. She appeared to me to be then in a perfectly collected state of mind, and could converse on all subjects. When I saw her before my appointment in August, 1833, she had been quite outrageous and unfit for business. In March she was in town for three or four days. I saw her several times every day. She was in her perfect senses, and wanted to resume the management of her affairs. She was again in town for three days in June. I saw her every day. She was perfectly in her senses, and had no need of a curator.

The Court referred to the Master to examine the applicant personally, and to report as to the state of her mind at the time of examination.

Postea (1st December, 1834).—The Master having reported that he had examined the widow personally, and that she was of sound mind, the Court found and declared her to be of sound mind, released her person and estate from curatorship, and discharged her curators.

In Re J. Rensburgh.

Curator bonis appointed to a person incapable, from deafness, of managing her affairs.

1835. Nov. 30.

In Re J. Rensburgh.

The defendant was summoned, on the application of Carel du Toit, a relative, to show cause why she should not be found to be incapable of managing her affairs, she being in a state of mental derangement, and why a curator should not be appointed over her person and estate.

Several of her other relatives opposed the application.

The party herself was in Court.

The applicant called

Dr. Liesching, a physician, who had examined the woman, and who stated his opinion that she laboured under imbecility of mind, and

Dr. Bailey, physician of Somerset Hospital, who had also examined her, and who stated: I found her to be deaf, which I considered to be hereditary, and she consequently exhibited apparent fatuity. I conclude that at one period of her life she must have heard, as she can speak, although she does not utter distinctly, but sufficiently so to be understood by her friends and relatives. I am of opinion that she labours under neither *mania*, fatuity, nor *melancholia* in any degree, but I am of opinion that she is unable to manage her affairs, and never will become so. I consider that, in consequence of her deafness and consequent difficulty of utterance, and the state of ignorance under which she labours in consequence of those defects, she is incapable of managing her affairs.

The Court found that A. J. Jantje van Rensburgh is incapable to manage her affairs, and ought to be placed under curatorship, and therefore remitted to the Master to report as to the person or persons proper to be appointed her curator or curators.

In Re H. P. J. Rensburgh.

Curator bonis appointed to a person deaf and ignorant in business.

Nov. 30.

In Re H. P. J. Rensburgh.

On a similar application with respect to H. P. J. van Rensburgh, the brother of the party in the preceding case, after hearing the evidence of Dr. Bailey, and an examination of the party in presence of the Court,

1835. Nov. 30. — *In Re* H. P. J. Rensburgh.

It appeared to the Court that he was in perfect possession of his mental faculties, but in consequence of his deafness, and a certain degree of ignorance of business consequent thereon, he could not, with safety to himself, be entrusted with the absolute management and disposal of his property, and that it was therefore necessary for his interest that a curator bonis should be appointed to take care of his property.

The Court gave judgment accordingly, and referred to the Master to report as to the person or persons proper to be appointed curator or curators bonis.

In Re G. C. Rens.

Curator bonis appointed to a deaf and dumb person.

1844. Dec. 14. — *In Re* G. C. Rens.

This was an application for the appointment of a curator to the person and property of G. C. Rens, as being incapable of managing the same himself, by reason of having been, and still being, deaf and dumb. The application was made by J. A. Munnik, married to the sister of G. C. Rens.

The applicant called evidence, which proved the deafness and dumbness; whereupon the Court found that he was capable of managing his person, but incapable of managing his affairs; and referred to the Master to report as to a fit person to be appointed curator of his property.

In Re Kaltenbach.

Insanity.

Verdict in criminal trial sufficient proof to appoint curator.

1845. Nov. 15. — *In Re* Kaltenbach.

At the criminal sessions of the Supreme Court holden on the 10th July, 1844, Kaltenbach was indicted for assault with intent to murder. The jury found that the prisoner committed the assault with the intent set forth in the indictment, and that he was at the time labouring under a paroxysm of furious mania. The prisoner was sentenced to be imprisoned in Somerset Hospital, or such other safe place of confinement as the Governor shall appoint, as a lunatic, during the period of his natural life.

1845. Nov. 14.

In Re Kaltenbach.

This day an application was made on the part of his wife, setting forth that he was possessed of some property, and praying that a curator may be appointed to take charge of it.

The Court held that by the above verdict and sentence, Kaltenbach had been found and adjudged to be of unsound mind and unfit to take charge of his own property; and therefore referred to the Master to report as to a fit person to be appointed curator to his estate, and appointed Mr. Hoffmeyr to act as the curator ad litem for the lunatic during the proceedings incident to the appointment of a curator to his estate.

In Re Kemp.

Release from the curatorship on the ground of recovery.

Dec. 13.

In Re Kemp.

On the 16th May, 1843, Ebenezer Kemp had been adjudged by this Court to be of unsound mind, and George Topping Kemp and Thomas James Mathew were appointed curators of his property in this Colony.

This day, the *Attorney-General* stated that Ebenezer Kemp had completely recovered his senses, and moved that the said appointment of his curators should be recalled. In support of his motion, he called certain evidence to prove the recovery.

Appeared also George Topping Kemp, one of the curators of the property and sole curator of the person of Ebenezer Kemp, and stated that he believed his brother had recovered his senses, and was capable of conducting his affairs, and prayed that he might be relieved from the curatorship over both his person and property.

Appeared also, *Mr. Ebden*, as Counsel for T. J. Mathew, the other curator, and stated that he did not oppose the motion.

The Court, therefore, ordered the applicant to be released from the curatorship over his person and property, with costs to Mathew.

CHAPTER II.—SECTION I.

ARREST: REAL.

SMUTS *vs.* SLACK AND OTHERS.

1878. March 31. *An arrest made by a creditor of the cedent of a debt (assignment whereof had been completed by delivery of the instrument, having an act of cession endorsed thereon) subsequent to the cession is ineffectual to attach a debt in the hands of a cedent's debtor.*

[Vol. I, p. 297.]

IN RE INSOLVENT ESTATE OF VAN AS.

Dec. 31. *Arrest on money, held good.*

[Vol. I, p. 339.]

IN RE LOND.

1830. Oct. 11. *Pignus prætorium prior, preferent to posterior special hypothec.*

[Vol. I, p. 483.]

MEYER *vs.* POHL.

Dec. 1. *Writ of execution cannot be enlarged after lapse of the original return of day.*

[Vol. I, p. 498.]

In Re Woeke.

1832. March 27.

Pignus mobilium, prætorium by attachment, is equivalent to tradition, and is preferent to tacitum vel legale et generale of prior date, but without tradition.

[Vol. I, p. 554.]

Rabie *vs.* Rabie.

1841. Feb. 4.

Attachment against the property of the husband, who was about to depart from the Colony, obtained by the wife, who had commenced proceedings for a separation a mensâ et thoro, for the security of her half of the common property.

[Vol. I, p. 241.]

Moore *vs.* Van Schoor.

Judicial attachment by Magistrate's messenger. Insolvency. Trustee. Security bond. Pignus prætorium.

The messenger to the Magistrate of Cape Town was proceeding to lay judicial attachment on the goods of E., when V. S. bound himself by bond in the messenger's favour for all goods "that had been seized." E. became insolvent, and the goods in question came into the possession of the trustee, who awarded no preference to the attaching creditor. The messenger, to free himself from liability to such creditor, brought action against V. S. for delivery of the goods. Held *(on appeal): that the seizure not having been completed, V. S. was not liable under the terms of his bond.*

Security bond ineffectual to create liability on the part of the surety for either goods or debt, when, in consequence of sequestration, the goods have been distributed by the trustee to the exclusion of the attaching creditor.

When an attachment has been completed, the pignus prætorium is not affected by the messenger's not taking a security bond, or not leaving a person in charge of the goods, or not removing them.

Rules 41, 42, 43, 44 *of Magistrate's Court applied.*

1832.
Dec. 18.

Moore vs. Van Schoor.

This was an application for review of a sentence of the Resident Magistrate.

Maskew, in execution of a warrant of the Court of Resident Magistrate, and as messenger thereof, was proceeding to lay a judicial attachment on the goods of Eksteen, the defendant, but before he had completed or signed the inventory, or signed or filled up the attachment, Van Schoor came in and granted a bond in the following terms:

"I, the undersigned Melt Jacobus van Schoor, do hereby declare to bind myself in favour of William Maskew, messenger of the Court of the Judge of Police for Cape Town and Cape District, to the following effect: That I, the said Van Schoor, will be, and am by these presents, responsible for all such goods or articles which have been seized by the messenger to satisfy certain warrant or warrants against Hendrik Oostervald Eksteen, H.son; to deliver the same to the said messenger at such day and at such hour as shall be required by him, for which I bind my person and property according to law.

(Signed) "M. J. VAN SCHOOR.

"Cape Town, 9th December, 1830."

Thereafter Eksteen became insolvent, and his estate, including the goods which the messenger had been in the act of attaching, was sequestrated and taken possession of by the Master. The trustee awarded no preference on those goods to the creditor, in whose favour the warrant had been begun to be put in execution by Maskew. Moore succeeded Maskew as messenger. Maskew ceded Van Schoor's bond to Moore, who, in order to escape from the liability or supposed liability of the messenger for the amount of the sentence, in execution of which the above-mentioned warrant had been obtained, brought an action against Van Schoor to deliver over the articles inventoried, or to pay the debt.

The Resident Magistrate dismissed the action, with costs to defendant.

Moore appealed.

The Court held, first, That the seizure and attachment of the goods had not been completed in terms of Rules 41 and 42 of the Resident Magistrate's Court. Secondly, And therefore that Van Schoor had incurred no liability whatever under the bond granted by him, which only bound him to deliver to the messenger such goods as *had been* seized; and on these grounds affirmed the sentence of the Resident Magistrate, and dismissed the appeal with costs.

1832. Dec. 18.

Moore vs. Van Schoor.

The Court also held that the bond granted by Van Schoor, although not in the exact terms prescribed by the 43rd rule of the Resident Magistrate's Court, was, in meaning and effect, a bond taken under the provisions of that rule, and imposed on Van Schoor the same liability as, and no other than, if it had been made in terms of the rule. That the surety in a bond granted in terms of that rule is not rendered liable either for the goods or the debt, when, in consequence of the sequestration of the defendant, the goods attached have been taken possession of by the Master, and their proceeds distributed by the trustee, to the exclusion of the creditor at whose instance they had been attached. And, lastly, that when the attachment has been once completed under the provisions of Rules No. 41 and 42, its effect, as creating a *pignus prætorium*, is neither destroyed nor impaired *merely* by reason that the messenger does not take a bond in security for, or leave a person in possession of, or remove the goods in terms of Rules No. 43 and 44.

DICKSON AND BURNIE *vs.* RICHARDSON.

Money, arrest of.

Attachment not competent to creditor of money paid into Court, on behalf of his debtor, before judgment given, or the debtor has judicially accepted the tender.

Charter of Justice, § 47.

1834. Feb. 6.

Dickson and Burnie vs. Richardson.

The following were the facts of this case:

Richardson had been arrested by the Sheriff, at the suit of Nisbet and Dickson, in execution of a judgment for £2,000 odd, which they had recovered against him in the Supreme Court.

This arrest was afterwards found to be illegal, and was set aside by the judgment of the Supreme Court. (*Vide Richardson* vs. *Nisbet and Dickson and the Sheriff*, 11*th June*, 1833.)

Richardson, thereafter, brought an action of damages against the Sheriff for false imprisonment.

The Sheriff, who had been indemnified by Nisbet and Dickson, paid £100 into Court as a tender of damages.

Dickson and Burnie, who now represented the firm of Nisbet and Dickson, applied to MENZIES, J., the Judge at

1834. Feb. 6.

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Chambers, for an attachment of this money, who refused to grant the attachment, but granted an injunction to prevent the said money being paid to Richardson, or any other person on his behalf, until the first day of next term.

On that day, the *Attorney-General*, for Dickson and Burnie, moved that the injunction should be continued for a further term, to enable them to serve Richardson with a summons, to show cause why the money should not be attached at their instance.

The Court refused the injunction, but in lieu thereof made this order: "That Richardson should, before obtaining an order from a Judge for the payment over to him of the money which had been paid into Court as a tender by the defendant in the case of *Richardson* vs. *Steuart*, give four days', previous notice of his application for such order to the attorney of Dickson and Burnie and of Steuart, the Sheriff."

All the Judges expressed strong doubts whether the money paid into Court as a tender could, under any circumstances, be attached before judgment was given for it in favour of Richardson, or until he had judicially accepted the tender.

Postea (February 6, 1834).—Due notice having been given to Dickson and Burnie,

Cloete, for Richardson, moved for leave to take out of Court and receive the said money.

No opposition being made on the part of the Sheriff,

The order was made as prayed.

Whereupon the *Attorney-General* moved for a rule against Richardson, to show cause why the said money shall not be attached and arrested in Court on behalf of the said Dickson and Burnie, and the same be paid over to them in part-satisfaction and discharge of the sum of £2,714, being the amount of deficiency due to them by virtue of a certain amended liquidation account or scheme of distribution, framed by the late commission for winding up the Sequestrator's department of the insolvent estate of the said James Richardson, bearing date the 27th day of April, 1830, confirmed on the 5th of June following, which said sum, together with the interest, still remains unsatisfied.

The Court refused the rule.

The ground on which MENZIES, J., concurred in this judgment, was that the applicants had not shown that, previously to the promulgation of the Charter, there was any form of process provided by the law of this Colony, by which the object sought by the applicants could have been effected; that this Court, under the Charter, had

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Feb. 6.

Dickson and Burnie vs. Richardson.

hitherto made no rule by which that object could be effected; consequently that, referring to the 47th section of the Charter, the Court had nothing to guide its decision except the practice of the Court of Record at Westminister, and that in so far as he had been made acquainted with the English authorities on the subject, it appeared to him that the application made by the Attorney-General would be refused by the Courts of Record at Westminster as incompetent.

Rule refused, with costs.

MASTER OF THE SUPREME COURT, ADMINISTERING THE AFFAIRS OF THE ORPHAN CHAMBER, *vs.* TENNANT.

Proceeding, form of, in sale of attached property.

Rule of Court III.

Aug. 19.

Master of the Supreme Court vs. Tennant.

On the 14th April, 1834, the Court made an order directing the peremptory sale, before the Resident Magistrate of Uitenhage, of certain immovable property of the defendant, Strydom, in execution of a judgment recovered against him by the plaintiffs, the Orphan Chamber.

Thereafter, the Master reported "that on the 5th of May last the Resident Magistrate of Uitenhage sold the same to A. W. Tennant for the sum of 30 rds.; that the property, which has been thus sold for £2 5s., has been valued at about £60; that the conditions of sale were printed and forwarded to the Resident Magistrate, as usual, for publication in Uitenhage and the vicinity, but the notice of sale, by some mistake originating in the Master's Office, omitted to be advertised in the *Government Gazette*. Whether this circumstance has or has not tended to depreciate the sale, the Master cannot say, but if it has, the fault has arisen in his office. The Master feels some reluctance in praying that the sale may be confirmed, without putting the Court in possession of all the above facts connected therewith."

On the 30th June, 1834, the Court, in respect of the above report, made a rule, whereby it was ordered that Alexander William Tennant, the purchaser of the said property, shall show cause, if any, to this Court on Tuesday, the 19th of August, why the sale of the immovable property aforesaid shall not be set aside for irregularity, in respect that the Rules of Court respecting the sale of real property had not been complied with.

1834. Aug. 19.

Master of the Supreme Court vs. Tennant.

This day, 19th August, 1834, appearance was made for the Orphan Chamber, but none for Tennant, the purchaser.

The Court dismissed the rule.

WYLDE, C.J., and KEKEWICH, J., held that it was not competent for the Court to set aside the sale by making this rule absolute.

MENZIES, J., held that it was competent for the Court to do so, and that the rule should be made absolute.

IN RE CARTER.—DICKSON AND BURNIE *vs.* THE TRUSTEE AND OTHERS.

1837. Feb. 14.

In Re Carter.—Dickson and Burnie vs. The Trustee and Others.

A few days previously to the estate of the insolvent being placed under sequestration, he, in concert with some of his creditors, executed a private trust, conveying his property to certain trustees. The trustees caused certain of his effects to be sold by auction by Mr. Blore, the auctioneer, on the 2nd of May. On the same day, and previously to his sequestration, Messrs. Dickson and Burnie obtained a provisional sentence against Carter, and on the same day obtained and delivered to the Sheriff the following writ:

"William, &c.

"We command you that of the goods and chattels of J. T. W. C. Carter, of Cape Town, or from the proceeds of his goods and effects sold this day, in the hands of John Blore, auctioneer, of Thomas Sutherland and Forbes Still, of Cape Town, or in whose hands soever the same may be, you cause to be made and attached the sum of £108 8*s.* 7½*d.*, &c., which William Dickson & Co., by sentence of the Supreme Court, &c., recovered provisionally, &c., &c."

The following return was made by the Sheriff:

"I have found no goods or chattels of the defendant, whereof I can cause to be made the exigency of this writ, or any part thereof. I have attached in the hands of John Blore, auctioneer, and of Thomas Sutherland and Forbes Still, the proceeds of the goods and effects of the defendant sold on the 2nd of May instant.

"J. STEUART.

"3rd May, 1836."

This day the *Attorney-General*, for Dickson and Burnie moved for a rule on the trustees to pay over the sums attached by the Sheriff to them, as having a legal preference,

instead of waiting until the estate of the insolvent was wound up, and distributed in terms of the Ordinance No. 64.

But the Court (KEKEWICH, J., absent), on the principle of the provisions of the Ordinance 64, § 29, refused the rule. But gave no opinion as to what degree of preference, if any, Dickson and Burnie had acquired over the sums attached by virtue of the attachment.

CLOETE *vs.* BERGH.

Arrest illegal. Damages for against peace officer, a deputy sheriff, making it.

Plaintiff claimed damages from defendant on the ground that the latter had seized and held, or caused to be seized or held, the plaintiff, and caused him by force to be taken through the streets of Stellenbosch to prison, and to be therein unlawfully detained for some hours.

The defendant pleaded that plaintiff had assaulted him, the defendant *then being the deputy sheriff of Stellenbosch*, and insulted and ill-treated him ,and had made a great noise and disturbance during the night, and prevented divers inhabitants of Stellenbosch from sleeping, &c., in breach of the peace, and that defendant, in order to preserve the peace, had given plaintiff in charge to a police officer to take the plaintiff into custody and to keep him, in order that next morning he might be brought before the magistrate to be dealt with according to law, as he might lawfully do.

It was proved that it is the custom in the village of Stellenbosch for some of the inhabitants on the first two or three nights of the new year to perambulate the streets with music, serenading and visiting their friends. That between two and three o'clock on the morning of the 3rd of January, 1839, plaintiff and some friends, who had been supping together, procured two fiddlers with violins and a little boy with a large toy-drum, and with this music, playing marches, waltzes, and quadrilles, went through several of the streets, calling at the houses of several friends, one of whom was a justice of the peace, by whom they were received in a friendly manner. While they were so engaged, defendant, who was the deputy sheriff of Stellenbosch, but who, as such, had only the same powers as a conservator of the peace which are possessed by constables, came from his house, about one hundred paces from where plaintiff and his music were, and commanded them in the Queen's name to cease playing,

1839. Feb. 28. — Cloete vs. Bergh.

which plaintiff refused to do, upon which defendant went away towards the police office, and plaintiff, who was not proved to have been making any noise or disturbance, even by singing, except that occasioned by his fiddles and drum, went to a friend's house, who opened his door, placed chairs for the plaintiff and his companion on his stoep, and regaled them with coffee, the musicians standing on this friend's stoep playing. At this time defendant returned with three policemen and demanded the music to cease, which they, by plaintiff's order, refused to do, and with the exception of the drum-boy, who ran away, continued playing, whereupon defendant came on the stoep and said to one of the fiddlers, "I'll arrest you, Jan Piet," and was proceeding to lay hold of him, to prevent which plaintiff shoved up defendant's arm and pushed him off the stoep, who then gave the plaintiff into custody of the policemen and caused him to be taken to prison, and to be confined there till the magistrate sat at 9 o'clock.

The Court held that Jan Piet had not been guilty of any breach of the peace, and consequently that defendant had no right to arrest or lay hold of him; and that as he was acting illegally in doing so, plaintiff was justified in preventing him by shoving him off the stoep, and thereupon, that as plaintiff in doing so had committed no breach of the peace, the defendant had acted illegally in causing him to be arrested and imprisoned, and gave judgment for plaintiff £5 damages, and costs.

WOLLASTON & CO. *vs.* HUNT, IN RE THE SHIP "BLACK SWAN."

Ship-arrest to found jurisdiction. Insurance. General average.

The "Black Swan," bound from London to the Cape, had on board goods consigned to W. & Co., at the Cape. En route she put in to Pernambuco for repairs, to defray the expenses of which the goods of W. & Co. were sold. On the ship's arrival at the Cape, the master refused delivery of the goods or their value, and on application by W. & Co., it being shown that the damage which made the repairs necessary was not such as to make it a general average, the Court granted an attachment of ship and owners' goods to found jurisdiction.

In this case, application was made by Wollaston & Co., consignees of goods to the value of £1,600 shipped in Liverpool in the *Black Swan*, now lying in Table Bay, and holders of bills of lading for the same, signed by Hunt, master of the said vessel, for an attachment of the vessel and of certain goods belonging to the owners, *jurisdictionis fundandæ causa*. The *causa debiti* being that the master refused to deliver the said goods or their value to the applicants, alleging (which was not denied) that he had been obliged to sell those goods, to pay for certain repairs made on the ship at Pernambuco, into which she had been forced to put in, and which were necessary to enable her to continue her voyage,

Attorney-General, in support of the application, quoted *Abbot on Shipping, Part* 3, *Cap.* 3, § 10; *and Freeman and Another* vs. *E. I. Company*, 5 *B. & A.*, 617. He maintained that the repairs made at Pernambuco were not occasioned by damage or losses, which rendered either the owners of, or the underwriters on, the goods, sold to obtain the money necessary for the repairs, liable for general average. (*Abbot, Part* 3, *Cap.* 8, § 7; *Holt on Shipping, p.* 193, *vol.* 2; *Park von Insurance, vol.* 1, *pp.* 205, 208; *Molloy Jus Marit.*, 275; *Beeve's Lex Mercatoria, p.* 164; *Stephen on Average, p.* 40, *and p.* 14; *Beinecke on the Principles of Indemnity in Marine Insurance, pp.* 184, 185; *Bell's Commentaries, vol.* 1, *vide General Average*, § 3; *Hughes on Insurance, p.* 291; *Powell* vs. *Gudgeon*, 5 *Marit. and Selw.*, 431; *Power* vs. *Whitmore*, 4 *do.*, 141; *McCulloch's Commercial Dictionary, p.* 51.) He put in an extract from the ship's log and the Master's protest at Pernambuco. (*Abbot, B.* 3, *Cap.* 8.)

Musgrave, contra, quoted *Hughes on Ins., pp.* 216, 286, to show that the goods of others on board were liable for applicants' loss as well as the ship. He maintained that the damage which made the repairs necessary was such as to make it a general average. (3 *Burge on Colonial Law, p.* 697; *Hughes on Ins., pp.* 218, 219, 223, 288, 289, 293; 1*st Haggart Rep., p.* 329.)

Attorney-General replied.

The Court granted the attachment prayed for against the ship, and the goods, the property of the owner, until security be found to the amount of £1,000, being the amount consented to by the applicants.

DUNELL AND STANBRIDGE *vs.* VAN DER PLANK IN RE SCHOONER "LOUISA."—JONES *vs.* VAN DER PLANK IN EADEM RE.

Ship-arrest, to found jurisdiction, granted at the instance of an English creditor on an English contract, on a vessel at anchor in Table Bay.

1839. Nov. 14.

Dunell and Stanbridge *vs.* Van der Plank, *in Re* Schooner *Louisa.* Jones *vs.* Van der Plank, *in eadem Re.*

Cloete, for Dunell and Stanbridge, produced an affidavit that Van der Plank was indebted to them by virtue of two bills of exchange, drawn on and accepted by him, and endorsed by the drawer and payee to them, and protested for non-payment, in an amount of upwards of £100; that Van der Plank had no domicile in this Colony, and was now at Port Natal, and that he was the sole owner of the schooner *Louisa*, now at anchor in Table Bay, and moved to have the schooner *Louisa* arrested by an attachment of the Court *jurisdictionis fundandæ causa*, and quoted *Voet*, 2, 4, 50, 55; 2, 1, 46.

Attorney-General, contra, quoted *Van der Linden Jud. Practyks, vol.* 1*st*, *p.* 269; *Huber's Prælect., vol.* 2, *Lib.* 2, 4, 5; *Thomson on Bills of Exchange; Story's Conflict of Laws;* and maintained that the law of arrest *jurisdictionis fundandæ causa* was a deviation from the Roman Law and from the general principles of law, and therefore was to be strictly construed, and not to be extended beyond those cases in which, by the Dutch Law, it was expressly laid down to be applicable, and could not be claimed by any person, except those for whose protection it was originally established; and that, therefore, although a creditor domiciled in this Colony at the time of the contract might be entitled, in respect of a debt which was originally contracted to him, or even which he had afterwards acquired at a time when he was domiciled in this Colony, to arrest goods found within this Colony belonging to his debtor, a person having no domicile, and not being within this Colony (and quoted the *Law of the Courts of the Lord Mayors of London and Dublin*, in which an arrest of a debtor's goods cannot be obtained except by a creditor residing within the jurisdiction of those Courts. *Sed vide Chitty's Coml. Law, vol.* 3, *c.* 14, *p.* 631.) That this was a very different case; that the debt arose entirely out of an English contract, made in favour of a person in London, Hassock & Co., the drawers, were English, living under the law in England. Van der Plank was also in England, and the bills were drawn on him at his residence in London, and intended to be paid in England. The contract was therefore an English contract, and the English creditor

1839. Nov. 14.

Dunell and Stanbridge *vs.* Van der Plank, *in Re* Schooner *Louisa.* Jones *vs.* Van der Plank *in eadem Re.*

was not entitled to take any proceedings against the acceptor not warranted by the law of England ; and that Dunell and Stanbridge, especially, as they were only endorsers after the bill had been protested for non-payment in England, were therefore not in the same situation as if the debt had been originally contracted to them, while they had their domicile and were living under the law of the Colony, or even before they had acquired a domicile here, and could not be in a better situation than Hassock & Co., who were not entitled to claim the protection of the law of this Colony, and whose agents Dunell and Stanbridge really were. In fact, Hassock & Co., who were not within the jurisdiction of this Court, were trying, by means of their agents here, to obtain the protection of the law of this Colony, to which they had no claim. (*Vide Borradaile, Thompson, and Pillans* vs. *Morkel, 13th November*, 1838.) He maintained that it was evident, from this protest for non-payment being made at the instance of Hassock & Co., and the bill having been endorsed to Dunell and Stanbridge after the protest, that the bill was held by the latter merely for the purpose of their collecting payment of it ; that, therefore, they were not *bonâ fide* creditors in their own right, and were not persons for whose protection the law of arrest had been introduced into the law of this Colony.

Cloete and *Musgrave* argued *contra*, and quoted the decision of the Privy Council in the case of *Balston* vs. *Brownriggs ; Erskine's Institutes, B.* 1, *C.* 19 ; *Voet*, 2, 4, 22, *sed et ex eo*, 1, 5, 2 ; *Grotius Inleid., B.* 1, *C.* 13, § 3 ; *Bort, B.* 2, § 14 ; *Voet*, 2, 4, 33 ; *Vide Story's Conflict of Laws, cap.* 14, § 549.

Cur. adv. vult.

JUDGMENT : This day (*postea*, 14th November, 1839) the Court unanimously decreed the attachment until security be found *Judicio sist et Judicatum solvi*, with costs.

And MENZIES, J., held that the attachment ought to be granted, even if applied for by Dunell and Stanbridge merely in the capacity of attorneys of Hassock & Co., while the latter was domiciled in England, and consequently it was unnecessary to inquire whether Dunell and Stanbridge were the real proprietors of the bills on which they founded their application, or merely held them as the agents of Hassock & Co. ; but that if the fact of their holding the bills merely as agents would have had influence on the judgment of the Court, it would have been competent to inquire as to this fact, notwithstanding their being in possession of the bills under a blank endorsation.

In Re Wools.—Roesch and Bruce *vs.* Thomson, Watson, & Co.

Sheriff's seizure. Preference, right of. Ordinance No. 3, 1844.

Sheriff's seizure gives no preference in the distribution where there is a seizure on two writs, and execution not quite contemporaneous, but on the same day.

1841. Nov. 18.

In Re Wools. Roesch & Bruce *vs.* Thomson, Watson, & Co.

In this case, Messrs. Roesch and Bruce, on the 31st August last, obtained a provisional sentence against Thomas Wool, a resident in Simon's Town; and at a later hour on the same day, Messrs. Thomson and Watson also obtained provisional sentence against the same person.

The Attorney of Roesch and Bruce took out execution immediately, and from the affidavit of Geyer, the messenger of the Sheriff, it appeared that on the 31st August, about a quarter past 11 o'clock A.M., the said writ was left at the office of the Sheriff; that deponent was charged with the execution thereof, and that he left Cape Town for that purpose about 1 o'clock of the same day, and arrived at the defendant's residence at Simon's Town at about half past 4 P.M.; that he immediately seized sufficient of the goods and chattels to satisfy the exigency of the writ; that before he had completed his inventory by affixing his signature thereto, a special messenger arrived at Simon's Town, who, at about half past 6 o'clock of the same day, delivered to the deponent, at the said defendant's residence, another writ of execution, which had been issued on the same day, at the instance of the above-named Thomson, Watson, & Co., and that in consequence thereof, the deponent then and there extended his said inventory.

The Sheriff made special returns on both writs in the following terms,—(that on Roesch and Bruce's writ),—"By virtue of this and another writ of execution, bearing the same date, in which Messrs. Thomson and Watson are plaintiffs, against the above-named defendant, I have levied out of the goods and chattels of the defendant the sum of £145 6*s.* 11½*d.*, which I have ready for the plaintiffs on the within required security being given, subject to the order of Court as to the distribution thereof between plaintiffs. I have found no other goods or chattels of the defendant whereof I can cause to be made the deficiency of this writ, or any part thereof."

The return on Thomson and Watson's writ was precisely in the same terms, *mutatis mutandis*.

The amount of Roesch and Bruce's judgment was for £33 1*s.* 6*d.*; Thomson and Watson's for £615 9*s.* 10*d.*

Cloete, for Messrs. Roesch and Bruce, maintained that they were entitled to be paid the full amount of their writ, upon the ground that by the present practice of the Courts of Holland, and in conformity with that which prevailed in England, and had for the last thirty years been adopted and acted upon in this Colony, it was undeniable, that by the very act of seizure of property by the Sheriff, a *pignus prætorium*, or rather, what more correctly is expressed, a *pignus judiciale*, was constituted upon such property, the effect of which was to make that mortgage effectual against any other mortgage of posterior date. That this priority was regulated by the very hour or moment; and that, although by *Voet* and *Van Leeuwen* it would appear that such preference was not carried to such extent at the time that these authors wrote, yet it was equally clear from *Van der Linden's Judicial Practice*, written in the beginning of this century, that the Courts of Holland had now recognized the effect of this *pignus prætorium*, and had maintained it against the creditors or trustees of any estate which had been subsequently surrendered. He referred to *Van Leeuwen's Cens. For.; Part* 1, *B.* 4, *cap.* 9, § 14; *Bachovius, p.* 7; *Voet*, 20, 4, §§ 28, 29; *Manier van Proceed., cum Notis van Leeuwen; Ordinance* 1580; *Van der Linden Jud. Praktyk, B.* 3, *c.* 6, § 19; *Kersleman, pp.* 657, 658. He also stated that the decision in the case of *Smith* vs. *Lloyd* and *Thomson* vs. *Lloyd*, 1st Dec., 1828, was not, under its peculiar circumstances, inconsistent with this principle, which had not been doubted, and had always been acted on until the present question had been raised.

The *Attorney-General* and *Brand* for Messrs. Thomson and Watson, put in affidavits by John Reid, defendants' attorney, and of Meeser, the messenger who carried Thomson and Watson's writ to Simon's Bay, in which it was sworn by the latter that he delivered it to G. F. Geyer, while he was writing the inventory of goods attached, and before he had written down the whole of the articles which he then attached. That the said Geyer then stated to the deponent, that upon his departure from Cape Town with the writ against the above defendant on behalf of Roesch and Bruce, expecting that another writ would be left with the Sheriff against defendant, he had given instructions to another person to proceed therewith to Simon's Town, and therefore he had attached the whole of the goods of the defendant in execution of both the said writs. Quoted *Voet*, 20, 2, § 32; *Burge, vol.* 3, *p.* 379, *&c.; Censura Forens., Part* 1, 4 *c.* 9, § 14; *Part* 1, *c.* 11, § 1; *Bell's Commentaries*, 2, *cap.* 3, § 2, ¶ 3; *Groenewegen, ad., c.* 10 *ff.* 26, 4; and therefore contended that, even although the inventory

1841. Nov. 18.

Roesch & Bruce vs. Thomson, Watson, & Co.

had been completed before the second writ was put in his hands, yet that equity should interpose and allow his client to share *pro rata* in the property attached.

The Court unanimously held, in accordance with the authority of *Voet*, 20, 2, 32, and *Van Leeuwen*, 1, *lib.* 4, *c.* 9, § 14, that the goods taken in execution by the Sheriff must be distributed among the two contending parties *pro rata*, seeing that Thomson and Watson intervened before the goods seized had been sold and the proceeds paid over to Roesch and Bruce, the first execution creditor; and gave judgment accordingly. Each party to pay their own costs.

[Same found 28th February, 1842, *In re De Kock, Rens* vs. *Lawton*, where Rens' writ had been lodged with the Sheriff, and seizure made on the 1st February, and Lawton's writ lodged and seizure made on 3rd February. *Vide* Ordinance No. 3, 1844, limiting the right of the posterior creditor to share *pro rata*.]

The facts of this case were: The Sheriff stated in his return that the sentences in both cases had been obtained on the same day; that the writs of execution had been issued thereupon and lodged with him on same day; that he had, by virtue of the said writs, caused a levy to be made, but had not found sufficient property to satisfy either of said writs, and prayed the direction of the Court how he should proceed as to the application of the moneys so levied; whereupon the Court directed him to divide and appropriate the amount so levied between the respective plaintiffs *pro rata*.

MAYNARD *vs.* GILMER'S TRUSTEE.

Attachment of "jus ad rem" to immovable property.

W. purchased, and partly paid for, certain immovable property, of which he did not, however, get transfer. G., a creditor of W., got judgment, and sued out a writ, the exigency of which could not be satisfied. G., without any special order of Court, sued out another writ, by virtue of which the aforesaid immovable property was attached. W. surrendered. His trustee got transfer and sold the property, and awarded G. a preference under the last attachment. A bond creditor objected. The Court set aside the preference accordingly, on the ground that W. had only a jus ad rem, which could not be attached by a writ founded on a jus in re.

In this case, the Master reported that Maynard objects to the plan of distribution in this estate by reason of the trustee having awarded to William Gilmer, under an attachment of the Supreme Court, the proceeds of the property attached, instead of applying it in discharge of his bond debt in preference. The objection appears to be founded on the circumstance of the transfer not having been effected until after the insolvency; and that when the attachment was made by the Sheriff, the property did not, therefore, legally belong to the insolvent.

The *Attorney-General* argued in support of the objection (*Voet*, 20, *lib.* 3, § 6), and maintained that there was no form of execution known in the law of this Colony whereby a *jus ad rem* to immovable property can effectually be attached by the creditors of the person having the *jus ad rem.*

Brand, contra (*Van Leeuwen, Part* 1, 4, 7, 18; *Voet*, 42, 1, 42).

Objection allowed, with costs.

It appeared that Mr. Gilmer had obtained a judgment against J. M. Wood for £326 and £46 3*s.* 6*d.*, with costs. In execution of this judgment he obtained a writ against the goods and chattels of Wood, on which the Sheriff returned: "I have seized all the goods and chattels found in the possession of defendant, whereof the appraised value is only £245 4*s.* 6*d.* There are, therefore, no goods or chattels of said defendant of which I can cause to be made the exigency of this writ or any part thereof.—9th September, 1840." On the 10th September, Mr. Gilmer, without obtaining any previous order of the Court, applied for to, and obtained from, the Registrar a writ, the preamble of which set out the above facts; and then proceeded to command "you that you attach and take possession of a certain store and premises situate in Table Valley, in Boom-street, being part of the divided erf of M. N. Moore, and now in the occupation of the said J. N. Wood; also, a certain house and premises situate in Table Valley, in Roeland-street, being part of the erf of the late Carel Frederick Wagner; also &c.; and also five lots of ground situate on Wynberg Hill, being part of the estate called Julia, the property of Mr. L. C. Jacobs;" and on this writ the Sheriff returned, "I have attached, as within directed."

The immovable property thus attached had all been purchased by Wood, and in part paid for by him; but he had not received transfer of any part of it. After Wood's insolvency, the trustee in his estate obtained transfer of the above property, and sold it; and Gilmer's trustee, in respect of the above attachment, claimed and obtained a preference on the proceeds.

1841. Dec. 14.

Maynard vs. Gilmer's Trustee.

But the Court unanimously held, that as Wood had only a *jus ad rem* to the above property, which was still *in dominio* of the persons from whom Wood had bought it at the time it was so attached, an attachment of the premises themselves, as the property of Wood, was invalid to attach the premises, and inept to attach the *jus incorporale* (namely, the *jus ad rem*, which, in consequence of this purchase, Wood had to demand and obtain transfer from the sellers), which was all that was vested in Wood, and that the transfer subsequently obtained by Wood's trustee did not cure this defect; and, consequently, that the attachment gave no ground of preference to Gilmer's trustee over the proceeds of the property so attached.

The Court gave no opinion that such *jura incorporalia* as Wood had had with respect to the said property might not be effectually attached by a judgment creditor of Wood's, in execution of the judgment, after Wood's movable and immovable property had been excussed, by virtue of a writ issued by order of the Court, so as to give such creditor a preference on the proceeds of the property, after it had been transferred to and sold by Wood's trustee; but they held that the form of writ for attaching immovable property vested in a debtor by legal transfer thereof, was not a fit or proper form for such a writ, and that the Registrar had no authority to issue any such writ without an order from the Court or a Judge at Chambers.

MAYNARD AND BAM, TRUSTEES OF JOHNSTONE, *vs.* HENDRICKSE.

1842. Nov. 24.

Maynard & Bam, Trustees of Johnstone, vs. Hendrickse.

In this case, Johnstone had had his estate sequestrated in 1835, and his trustees had not, prior to August last, framed a liquidation account of the estate. In August last a creditor of Johnstone's, whose debt was contracted subsequently to the sequestration, sued Johnstone in the Court of the Resident Magistrate for Cape Town, and recovered a judgment for £18, in satisfaction of which a writ was issued and placed in the hands of the messenger, Hendrickse, who, in execution of the writ, seized certain goods and chattels which he found in Johnstone's possession, in consequence of which the trustees brought an action against Hendrickse in the Court of the Resident Magistrate, alleging that those goods had been unjustly seized and attached, and praying that he should be adjudged to restore them or their value.

Hendrickse, who was indemnified by the execution creditor, opposed that action, and pleaded that the plaintiffs were barred from maintaining it, by reason of their *laches*, in not having complied with the provisions of the 82nd Section of Ordinance 64. The Magistrate sustained this defence.

1842. Nov. 24.

Maynard & Bam Trustees of Johnstone, *vs.* Hendrickse.

The Court unanimously reversed the sentence of the Magistrate, and gave judgment for plaintiffs, both in the Court of the Magistrate and in this Court.

AREND *vs.* HENDRICKSE.

Illegal seizure by Magistrate's messenger. Ownership. Tradition.

Movable property of A in the possession of B, and apparently in B's ownership, is not liable to be taken in execution of a fine levied on B in a prosecution at the suit of the Crown, even though it might be liable to be taken in execution of B's debts, allowed to be contracted on the faith of the property being that of B.

1843. Feb. 27.

Arend *vs.* Hendrickse.

The defendant in this suit, J. C. Hendrickse, messenger to the Resident Magistrate's Court, was summoned to answer the plaintiff, Arend, a Malay native of the Cape, in an action for the delivery of certain articles of furniture illegally seized, and for damages.

The plaintiff declared that in January last, the defendant, in his capacity as messenger of the Resident Magistrate's Court, had seized, in execution of a judgment of the Magistrate, at the suit of the Clerk of the Peace, as prosecuting for the Crown, against one Keetje, *alias* Cornelia Gross, a quantity of furniture, which was specified, altogether of the value of £75; notwithstanding that notice had been served upon the defendant that these articles of furniture were the property of plaintiff, and could not be lawfully seized. Wherefore plaintiff claimed that defendant might be condemned to deliver the said articles to him; or otherwise that he should pay him £75 as damages, with the costs of suit.

The defendant admitted that he had seized the furniture as alleged, but denied every other allegation of plaintiff, and thereon joined issue.

Cloete, for plaintiff, called evidence, which clearly proved that the plaintiff had purchased and paid for the articles of

1843. Feb. 27.

Arend vs. Hendrickse.

furniture which had been seized. Cornelia Gross was the tenant of the house; she had let the lower floor to the plaintiff, and herself occupied the upper. The furniture was in the portion of the house occupied by her, and apparently her property, and had been placed there at the plaintiff's request. It was seized in execution of a sentence of the Magistrate, fining her for a contravention of the Wine and Spirit Ordinance.

Cloete, for plaintiff, contended that the evidence established that the property of the furniture in question had been originally acquired by and vested in Arend by purchase; that no proof had been produced to show that he had ever divested himself of such property in favour of Cornelia Gross; and that the fact of Arend having lodged the furniture in her house, under the circumstances proved by the evidence, was not sufficient in law to divest him of the property in her favour, or to render it liable to be taken in execution of a sentence imposing a fine on her, even although it might be liable (which he denied) to be taken in execution for debts contracted by her, on the ground that plaintiff, by his conduct, had misled her creditors to contract with her on the faith of that property being hers.

Porter, A.-G., contra, referred to the English and Scotch doctrine of reputed ownership, and quoted *3rd Coke's Reports, p.* 80 (*Twine's case*); *Smith's Leading Cases and the Notes; Bell's Comm., c.* 3, § 4, *art.* 1, *Reputed Ownership.*

Cur. adv. vult.

On the 1st March, the Court unanimously gave judgment for plaintiff for the amount for which the property claimed by him had been sold, with costs, for the reasons founded on by *Cloete*.

On the 7th March, being seven days after judgment had been given for plaintiff in the action above reported, the plaintiff Arends was convicted by the Resident Magistrate of Cape Town of having contravened Ordinance No. 93, by selling wine without a licence, and was, in respect thereof, sentenced to pay a fine of £50. On the same day a warrant was issued to levy the amount of the said fine on the goods of Arend.

On the 8th, a writ of attachment was obtained from the Supreme Court, by the Clerk of the Peace, for attaching, at the suit of the Crown, for payment of the said penalty, in the hands of Hendrickse, the sum which, by the judgment of the Supreme Court given in the above-mentioned suit, he had been condemned to pay to Arend. The writ

of attachment was executed on Hendrickse; and Arend and he were summoned to show cause on this day; the former why the Court should not decree the said Hendrickse to pay over the sum attached to the Clerk of the Peace on behalf of the Crown, to satisfy the said fine of £50; and the latter why he should not obey the decree so to be given.

Brand, for Hendrickse, appeared, and declared his willingness to pay over the money attached in his hands to whomsoever the Court should, by their decree, adjudge it to be paid.

Cloete, for Arend, and more particularly for Mr. Meeser, his attorney in the suit above mentioned, objected to the claim of the Crown to the extent of the amount of the costs incurred by him as attorney for Arend in the said suit, on the ground that, by law, an attorney has a lien for his costs on the sum which his client's adversary is adjudged by the Court to pay to his client, not merely as against his client, but third parties; and that this lien was preferable to the lien of the Crown for debts or penalties incurred to the Crown by the client of the attorney, subsequent to the date of the judgment given in favour of his said client.

After hearing Counsel shortly, the Court, in consequence of the novelty and general importance of the questions of law raised, held it fit that they should not be decided in so summary a manner, and postponed the case for more deliberate argument and consideration. And ordered Hendrickse to pay the money attached in his hands into Court.

Postea (12th June, 1843).—*Ebden*, for Arend and Meeser, was this day further heard, and quoted *Archbord's Practice, pp.* 53, 54; *Peterdorff's Abridgment, pp.* 659, 663, *vol.* 2.

Attorney-General, contra.

Cur. adv. vult.

Postea.—Ordered by consent that the money in Court, minus the fees of Court due, be paid over to the Clerk of the Peace, to be distributed as per agreement.

SECTION II.

ARREST, PERSONAL.

WALLACE *vs.* HILL.

1828. Oct. 8. *Arrest judicio sisti in a suit between two passengers, foreigners, for acts done at sea. Power of Supreme Court to grant.* [*Not decided.*]

[Vol. I, p. 347.]

HORNBLOW *vs.* FOTHERINGHAM.

1829 Jan. 16 Aug. 15. *Arrest of peregrinus in peregrinum jurisdictionis fundandæ causâ.* [*Not decided.*]

[Vol. I, p. 352.]

SMITH *vs.* DAVID.

1832. March 13 *Rules of Court* 8, 9. *Arrest sued out by a person not being an attorney, irregular.*

[Vol. I, p. 544.]

NISBET & DICKSON *vs.* RICHARDSON.

May 8. *Arrest, personal, civil, cannot be executed in dwelling-house or precincts except for recovery of debts due to the fisc.*

[Vol. I, p. 562.]

RICHARDSON *vs.* NISBET & DICKSON AND THE SHERIFF.

Arrest, personal, criminal.

Arrest, privilege from, accorded to witness in a criminal case.

1833. June 11.

Richardson vs. Nisbet & Dickson and the Sheriff.

This day, *Cloete*, for Richardson, a prisoner in the gaol of George, taken under a writ in execution of a judgment of the Supreme Court, obtained by Nisbet & Dickson against Richardson, applied to make the rule for his discharge absolute.

Case postponed until the 13th June. *Cloete*, for Richardson, showed cause in support of the rule, and stated that it was agreed between both parties that this motion should be disposed of by the decision of the Court on the following questions:—

1st. Whether a summons or notice served or given according to law, to appear to stand trial on a criminal charge before a competent Court, did or did not protect the person during his coming and remaining for the purpose of obeying the summons or notice, and during his returning from so doing.

2ndly. Whether, supposing that this person had previously been legally arrested in April, 1832, and had unlawfully been rescued or had escaped from such arrest, that circumstance did or did not deprive that person of the protection which he would otherwise have enjoyed.

3rdly. If this question is resolved in the affirmative, whether the defendant in this case had on a former occasion been lawfully arrested, and had been unlawfully rescued, or had escaped from such arrest.

The *Attorney-General*, for the incarcerating creditors, signified his concurrence in what had been stated.

Cloete, in support of the affirmative of the first question, quoted *Voet*, 2, 4, § 40; *Peckhuis Verhandeling van Opleghten, Edition* 1693, *cum notis S. van Leeuwen*, 5 *Cap., pages* 161, 177 (*vide Peckii Tractatus de Jure Sistend., Ed. Busæi, page* 66); *Carpzovius Practica Nova Rerum Criminalium, P.* 3, *Qu.* 112, §§ 6, 15 & 16, 17, 18; *Bort. Van Arrestin, B.* 4, § 29, *and B.* 2, §§ 16, 15; *Matthæus de Crim. L.* 48, *t.* 14, § 8; *Mestertius Tractatus, page* 53; *Hovendorp Translation of Carpzovius, 2nd vol.*, § 104.

The Court thought that it lay with the Attorney-General to make out the affirmative of the second question, and stopped Cloete until the Attorney-General should be heard.

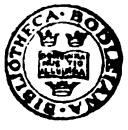
Thereupon the *Attorney-General* and *De Wet* argued in support of the negative of the first question, and quoted

1833. June 11. — Richardson vs. Nisbet & Dickson and the Sheriff.

Carpzovius Pract. Nov., P. 3, *Qu.* 112, §§ 6, 8, 15, 16, 17, 18; *Van Leeuwen, Roman-Dutch Law*, 514; *Bort.* 4, § 1; *Van der Linden, Jud. Pract.*, 1, 6, 29; *Hovendorp Translation, 2nd vol.*, § 104; *Matthæus de Crim., L.* 48, 14, § 8.

WYLDE, C.J., and KEKEWICH, J., were clear that the first question must be decided in the affirmative, and were of opinion either that the second question ought to be decided in the negative, or that this question ought not to be considered by the Court as not being properly raised in the present state of the proceedings, and made the rule for the prisoner's discharge absolute, with costs.

MENZIES, J., was of the same opinion on the first question. He thought that the second question had been raised by the parties, and therefore required the decision of the Court before judgment could be given. He had very great doubts on it, and urged that the Court should take time to consider their judgment, but was overruled.



STILL *vs.* GILBERT.

Arrest. Rules of Court, 8, 14. *Ord. No.* 64, § 95, [6 *of* 1843, § 95.]

It is competent for the Court or a Judge at Chambers, on proof by affidavit that a debtor, whose estate is under sequestration and has not got his certificate, intends to leave the Colony, to order, if they should see cause, a writ to be issued for the debtor until he should give bail not to leave the Colony.

1840. Nov. 6. „ 30. — Still vs. Gilbert.

MENZIES, J., at Chambers, on the 30th October, ordered that a writ of arrest (under the 14th Rule of Court) be issued against the insolvent, as prayed in the plaintiff's petition (supported by affidavit), setting forth that the plaintiff was creditor on the insolvent estate by virtue of three promissory notes (therein described) of which he is the lawful holder;—that a final liquidation account of insolvent's estate had been duly filed and confirmed, in which the whole assets had been awarded to preferent creditors, and no dividend to plaintiff in respect of his said debt;—that plaintiff has been informed, and verily believes, that the insolvent was about to leave the Colony in the ship *Esperance*, bound to Mauritius, the master of which had informed plaintiff that insolvent had taken his passage for

that purpose, and that the ship is about to sail. Wherefore he prayed that a writ of arrest may be issued against the insolvent, to compel his appearance before the Supreme Court on the 2nd November next, to show cause why he had not paid said debt.

Insolvent was arrested by the Sheriff on the 30th October, on the said writ, but escaped, and was again arrested on board the ship, and on the 2nd November the Sheriff produced the defendant in Court. Whereupon, *Musgrave*, for the plaintiff, under the 95th section of Ordinance No. 64, moved for a decree of civil imprisonment against insolvent, who prayed time to show cause against the motion, and the case was postponed until the 5th November, and insolvent, who had not offered bail, was remanded to prison.

The Court (WYLDE, C.J., absent), had no doubt that this case, in which the plaintiff was proceeding to obtain decree of civil imprisonment under section 95 of Ordinance 64, was one "where by law the defendant might be arrested and held to bail," and therefore that a writ of arrest might lawfully be issued by the Registrar under the provisions of the 8th and 14th Rules, or at all events under an order from a Judge at Chambers, and this was not questioned by the defendant's Counsel.*

On the 5th November, defendant was brought into Court, when *Cloete* objected to decree of civil imprisonment being given, on the ground, 1st, That plaintiff was not the legal holder of the said notes (*sed vide Stretch* vs. *Campbell*), and therefore not entitled in respect of them to insist for such decree against defendant, because it was proved by the proceedings under the sequestration, which he produced, that at the time at which the notes were made by defendant in favour of Hindley, by whom they have been indorsed to plaintiff, and at the time of said indorsation, Hindley's estate was under sequestration, and he had not received his certificate. 2ndly, He produced an affidavit of defendant, which, if true, showed that the first and third of the three notes in question had been obtained by Hindley from defendant by fraud, and without any consideration, and that before plaintiff became the holder of them defendant had

* NOTE.—In *Blake* vs. *Barrow*, 12th April, 1842, Judge Menzies incidentally stated his opinion that, *non obstante* the 29th and 30th sections of Ordinance No. 64, it was competent for the Court or a Judge at Chambers, on proof by affidavit or otherwise that a debtor, whose estate was under sequestration and had not got his certificate, intended to leave the Colony, to order, at any stage of the proceedings in the sequestration, if they should see cause, a writ to be issued for the arrest of the debtor until he should give bail not to leave the Colony. The Chief Justice said that, as then advised, he was not disposed to question the soundness of this opinion.

1840. Nov. 5. " 30. Still *vs.* Gilbert.

given him notice of this; consequently, plaintiff was liable to every objection that defendant could have pleaded against Hindley, and therefore was not entitled to demand payment from, much less decree of civil imprisonment against, defendant in respect of those two notes.

The Court held that the application for civil imprisonment could not be granted until those two objections should be disposed of, and postponed the further hearing of the parties on those objections until the first day of next term, and remanded the defendant to prison, unless he should find bail *de judicio sisti*. Plaintiff consented to defendant's liberation on giving such bail for £50, which he did, and was liberated.

Postea (30th November, 1840).—Defendant produced a notice of discontinuance of action given him by the plaintiff, and moved for costs. *Musgrave*, for plaintiff, opposed the motion. But the Court awarded to the defendant his costs from the commencement of the proceedings.

STOLL *vs.* BRANDT.

Sheriff. Arrest. Security. Costs. Rule of Court No. 14.

The Sheriff, on making arrest, must, if security is offered, take it not merely for the amount of the debt and costs mentioned in the rsit, but also for £35 *or* £40, *to cover further costs.*

1842. Feb. 1. Stoll *vs.* Brandt.

In this case, on the motion of the plaintiff, who had obtained a writ for the arrest of the defendant under the 14th Rule of Court, the Sheriff was directed to take sufficient security not only for the amount of the debt sued for, but also for £40, to cover costs.

And the Court intimated an opinion that in all similar cases, in which he was not specially ordered to do otherwise, the Sheriff ought, in virtue of the said 14th Rule, to take security not only for the sum or thing mentioned in the writ, and the costs and charges endorsed thereon, but also for £35 or £40, in order to cover any costs which, by the judgment of the Court, the defendant may ultimately be adjudged to pay.

ROBERTS *vs.* ANDREWS AND TUCKER.

Arrest. Rule of Court No. 8.

Arrest dissolved and bail bonds discharged, where the affidavit of the party at whose instance the arrest of A. and T. was made set forth as the cause of action an assault on him "by one or other of them," which being in the alternative, the Court held not to be within the requirements of Rule 8.

1842. May 14.

Roberts *vs.* Andrews & Tucker.

Musgrave, for defendants, moved that the arrest of the defendants should be dissolved and their bail bonds set aside. He first read the affidavit of plaintiff on which the writ had been issued:

"Richard Roberts, formerly of Gray's Inn, London, but now a passenger on board of the brig *Prince Albert*, bound to Algoa Bay and Singapore, maketh oath and saith that Wm. A. Andrews, master of the said brig, and Henry Tucker, mate of the said brig, are well and truly indebted unto deponent in the sum of £50 sterling lawful money, being for damages by him sustained in consequence of the said Wm. A. Andrews and H. Tucker, or one or other of them, have wrongfully and unlawfully assaulted, or caused or procured or suffered the deponent to be assaulted, on the 9th day of April last past, on board the said brig on her voyage from London towards Table Bay, Algoa Bay, and Singapore; and the deponent further saith that he hath no mortgage, pledge, or security for the said claims or any part thereof. And lastly, that he verily believes the said Wm. A. Andrews and H. Tucker are about to leave Table Bay on board of the said brig on Friday morning next, 13th day of May instant, having been so informed by the agents of the said brig.

"RICHARD ROBERTS."

And argued that the affidavit was not sufficient, as it did not set forth what was required by the Rules of Court (Rule No. 8), in so far as it was not direct and positive as to the cause of action, as it only charged that one or other of the defendants had committed the grievance and injury alleged. Secondly, that the affidavit not only did not set forth that defendants were about to leave the Colony, but, on the contrary, stated that they were only leaving Table Bay to go to Algoa Bay, whither the plaintiff himself was to go. Thirdly, that, contrary to the provisions of the 14th Rule, the writ did not mention any sum which was demanded

1842. May 14. Roberts vs. Andrews & Tucker.

by plaintiff. Fourthly, that the defendants were arrested while under the protection of the Court, having been attending before the Registrar of Court, acting in commission appointed to take evidence *de bene esse*, in a suit in which defendant Andrews was defendant, and Tucker was a witness; and after the examination had been adjourned till the next day, having repaired to an inn in the vicinity of the Court, he had been there arrested.

The *Attorney-General*, for plaintiff, admitted that he could not contend against the objection that the affidavit being in the alternative was not direct and positive.

On this ground the Court dissolved the arrest, and ordered the bail bond to be discharged with costs, without entering upon the other objections.

THOMPSON *vs.* ANDREWS.

Arrest. Rule of Court No. 8.

What is a sufficient arrest under this Rule.

May 14. Thompson vs. Andrews.

In this case, *Musgrave*, for defendant, made a similar motion to that made by him in the preceding case, on the following grounds, and read the affidavit on which the writ had been issued:

"Richard Thompson, formerly of London, but now a passenger on board the brig or vessel called the *Prince Albert*, whereof William Allen Andrews is master, bound to Algoa Bay and Singapore, maketh oath and saith that the said W. A. Andrews is justly indebted to deponent in the sum of £20 sterling of lawful money, being for damages by him sustained in consequence of the said W. A. Andrews having wrongfully and unlawfully withheld, or caused to be withheld, from deponent, or having failed or omitted to supply or furnish to deponent divers quantities of beef, pork, flour, peas, sugar, spirits, oatmeal, rice, raisins, vinegar, potatoes, and water, which were shipped or put on board of the said brig or vessel for the use of deponent on the voyage of the said brig from London towards Table Bay, by or on the part and behalf of the charterers or owners of the said brig, according to a contract or agreement made with them by deponent; and also in consequence of the said W. A. Andrews having, on or about the 14th day of March last, and on the high seas, on the said voyage, on board of the said brig or vessel, caused or procured or suffered the

deponent to be assaulted and ill-treated by the officers or crew of the said brig. And the deponent further saith he had no mortgage, pledge, or security for the said claim or demand, or any part thereof; and further that he verily believes the said W. A. Andrews will sail on and with the said brig from Table Bay in the prosecution of her said voyage on Thursday next, the 12th day of May instant; and the ground of his belief is, that he heard the said W. A. Andrews say on board of the said brig that such was his intention.

"RICHARD THOMPSON."

And contended that the affidavit was defective for want of sufficient specification of the facts from which the cause of action arose, and therefore was not sufficiently direct and positive. That it did not set out the nature of the contract, or that the defendant was a party or privy to the contract, nor did it afford any means of forming any estimate of the extent of the injury or damage which the plaintiff had sustained; and quoted *Tidd's Forms, page* 84—*Affidavit for arresting and holding to bail the captain of a vessel; Van der Linden's Institutes, pages,* 434, 435; *Tidd's Practice,* 171, 182, *&c.* 2ndly. Objected that the affidavit did not expressly allege, as required by Rule 8, that the defendant "is about to remove, or making preparation to remove from the Colony," to which the allegation in the affidavit is not equivalent.

It was admitted that the vessel arrived in Table Bay on the 26th of April last.

The *Attorney-General* maintained that the authorities quoted from the law of England had no application, as they related to arrests on mesne process, without reference to whether the defendant was or was not about to leave the realm; while the arrest in this Colony, as in the present case, is only granted when the defendant is about to leave the Colony; therefore there is no reason why the same particular specification of facts should be required in the affidavit here as in the affidavits in England. And 2ndly, that, whether the specification of facts in the affidavit is sufficient to warrant the Court, without further inquiry, to sustain the arrest or not, still it was, in point both of form and substance, sufficient to warrant the issue of the writ. And 3rdly, he maintained that the allegation in the affidavit was equivalent, at least in so far as related to the issuing of the writ, to what is required by both the words and spirit of the 8th Rule. 4thly, he put in the affidavit of the plaintiff's attorney, to show that the plaintiff had not improperly delayed commencing proceedings. 5thly, that the

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defendant having attended the examination of the witnesses, must be held to have waived any right he may have had to object to the validity of the arrest.

Musgrave replied.

The Court held unanimously that the averments in the affidavits sufficiently complied with the requisition of the 8th Rule, and warranted the issuing and execution of the writ of arrest; and that the question whether they did so or not was the only question for the decision of the Court; and therefore dismissed the application with costs. They held that they could not decide upon, nor had they any data on which they could decide, whether this was a case, in which, on the merits as appearing from *prima facie* evidence furnished by the affidavits of the parties, the arrest which had been obtained should be discharged or confirmed.

ROBERTS *vs.* TUCKER.

Arrest. Witness, freedom of, from arrest. Unliquidated damages. Summons. Warrant of attorney.

Where a defendant has been arrested and the arrest set aside for defect, he can be arrested a second time by the plaintiff on the same cause of action.

Where a witness having attended an examination de bene esse. to which he had not been subpœnaed, was arrested, held that not having been summoned he was not privileged from arrest.

The mere contemplated departure of a debtor from the jurisdiction is sufficient to warrant arrest; the departure need not be fradulent or to defeat plaintiff's claim.

An unliquidated claim for damages, the amount of which is estimated on oath in the affidavit, is sufficient foundation for arrest, unless the claim is frivolous or the Court sees no probability of £50 *damages being awarded.*

A warrant of attorney to institute proceedings, &c., for damages "for an assault sustained by me on board of the said brig," without specifying the name of the person against whom the action was to be instituted, held sufficient.

1842. May 27.

Roberts vs. Tucker.

Musgrave moved to set aside the arrest of the defendant on a writ obtained against him by the plaintiff on the following grounds: 1st, That the defendant having been arrested by the plaintiff, and the arrest set aside for a defect in the proceedings, could not be a second time arrested by the plaintiff on the same cause of action. 2ndly, That the arrest was bad, because made while the defendant was under privilege, namely, while returning to his ship from attending an examination of witnesses taken under a commission of this Court, and under which the defendant had, on the day of arrest, been examined as a witness; and this even although he had not attended in obedience to a *subpœna*. (*Dodd's Practice; Voet*, 2. 4, § 40; *Erskine's Institutes*, 1, *lib.* 2, § 21; 2 *Chitty, Equity Index*, 1,157.) 3rdly, Because the defendant is in this Colony only for a temporary purpose, and is leaving not for a fraudulent purpose, nor for the purpose of defeating the plaintiff's claim against him. 4thly, Because the ground of action was not a debt, but only a claim for unliquidated damages. 5thly, Because the affidavit of the plaintiff was not entitled to credit, in so far as he estimated the amount of his damages, because on the former arrest, which was directed against the defendant and another, he estimated the amount of his damages against both at only £50, while now that he has brought a separate action against each, he has sworn in the affidavit on which he had obtained the writ of arrest against each, that each of them was indebted to him for damages to the amount of £50. 6thly, He maintained that the writ had been irregularly sued out, because the warrant or authority to sue, signed by plaintiff and filed by the attorney, as required by Rule 8, merely nominated and appointed the attorney "for me and in my name, to institute proceedings of claim and demand by way of arrest for damages *for an assault sustained by me on board of the said brig*," without specifying the name of the person against whom the proceedings were to be instituted, or specifying the particular cause of action, so as to identify the present suit as that which the plaintiff intended should be instituted.

The *Attorney-General, contra*, argued against the sixth objection, and maintained that the only principle on which the rule was made, requiring the attorney to file his warrant or authority to sue, is to secure to the defendant, in the event of his gaining the action, his recourse against the plaintiff for his costs; and therefore that any written authority, signed by the plaintiff, which is sufficient to render him liable for the costs by proving him to have authorized the institution of the suit, is such a warrant or

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authority to sue as is required by the 8th Rule. 2ndly, That even if the warrant, for want of specification, was insufficient to authorize the issue of an ordinary summons, it is sufficient for obtaining a writ of arrest; because the Rule requires, before a writ of arrest can be issued, that not only a warrant to sue shall be filed, but along with it an affidavit, which, in this case, does contain such a specification as clearly to identify both the defendant and the particular cause of action. (*Bell's Commentaries*, 2 *vol.*, *part* 5, *Chap.* 2, § 2.)

The Court unanimously dismissed the application with costs. They held that no authority had been shown to exist which could support the first objection. 2ndly, That the defendant not having attended the examination *de bene esse* in obedience to a *subpœna*, had done so *sua sponte*, and was *non-citatus*, and therefore had no privilege. (*Voet*, 2, 4, 30.) 3rdly, That to warrant the issuing of a writ for the arrest of an alleged debtor, it is, by the law of this Colony, sufficient that he is about to leave the Colony, and thus go beyond the jurisdiction of the Court; and it is not necessary to the issuing of the writ that the debtor should be so leaving the Colony for a fraudulent purpose, or for the purpose of defeating the plaintiff's claim against him. 4thly, That an unliquidated claim for damages, the amount of which is estimated on oath by the plaintiff on his affidavit, is a sufficient debt to warrant not only the issuing of the writ, but to support it when defendant shall seek to have it quashed for want of a sufficient debt, unless it shall be shown to the Court that the claim is frivolous, or at least that, under the circumstances of the case, there is no probability of damages to the amount of £50 being awarded by the Court. 5thly, That if the damages which the plaintiff has sustained from the injury alleged to have been committed by two persons amount to £50, yet, as each of them is liable *in solidum* for the whole amount of the damages, the plaintiff is entitled to sue either for that amount, and in his affidavit to swear to that amount being due by the defendant against whom he proceeds; although he cannot recover more from both than the amount of the damage he had actually sustained by the injury. 6thly, That the sixth objection was bad on the grounds maintained by the Attorney-General in his first answer to it, there being no allegation, much less proof, that the attorney had under it, filed as his authority to sue, instituted any other action against the defendant, or any one, for damages for assault sustained by plaintiff on board the *Albert*. That it was a document which the attorney was entitled to file, as the authority to sue *on any*

one action at the instance of the plaintiff, for damages for an assault sustained by plaintiff on board the *Albert*; but that the instant it had been so filed, its power was exhausted, and it could not be used as a warrant to institute any other action.

1843. May 27. Roberts *vs.* Tucker.

NORDEN *vs.* SUTHERLAND.

Arrest. Rule of Court No. 8.

Arrest set aside where the facts stated in the affidavit, on which the arrest was founded, did not, in the opinion of the Court, afford evidence of an immediate departure from the Colony.

1845. June 3. Norden *vs.* Sutherland.

The plaintiff had obtained the process of the Court for the arrest of the defendant, under the provisions of Rule No. 8, on an affidavit, in which, after stating the cause of debt, &c., &c., the plaintiff stated that "the said James Sutherland has left Table Bay with his said vessel *without clearing out*, or any port clearance, and expressed his intention to proceed from Saldanha Bay to Europe, as soon as he has completed the lading of the said vessel at that port."

On this process the defendant was arrested, and this day *Ebden*, for defendant, moved to have the arrest set aside on the grounds that the affidavit did not contain what was required under the Rule, as necessary to support the writ, and quoted *Chitty's General Practice, vol.* 3, *part* 1, *p.* 334, and maintained that here there was no statement of the plaintiff's belief that defendant was going to leave this Colony, nor did it state any sufficient grounds for such a belief.

Cloete argued *contra.*

The Court set aside the arrest with costs,—holding that the facts stated in the affidavit, even supposing them to be sufficiently supported by the plaintiff's oath, as to his belief of them, afforded no evidence of any such *immediate* departure from the Colony as to warrant his arrest on that ground.

THE MASTER OF THE SUPREME COURT *vs.* A. B.

Anticipation of arrest. Rule of Court 135.

1845. Nov. 10.

The Master of the Supreme Court vs. A. B.

On the 10th November, the Master of the Supreme Court filed an affidavit, dated 8th November, 1845, with the Registrar, setting forth that A. B., Esq., of Woodstock, was indebted to the deponent in his said capacity in the sum of £3,000, with interest from 1st January, 1844, by virtue of a bond passed by the said A. B. in favour of the Master in his said capacity, and in the further sum of £650, with interest thereon from 1st January, 1844, being the balance of a bond for £750, passed by the said A. B. in favour of the Treasurer-General of the Colony, on behalf of the Discount Bank, and by the said Treasurer-General (being duly authorized thereto by the Government of this Colony) duly ceded and transferred to the said deponent, together with a further sum of £17 10*s.*, for premiums of insurance paid by the deponent in his said capacity for account of the said A. B., in terms of his engagements by virtue of the said bonds, making together the sum of £3,667 10*s.*, for the security whereof the said A. B. had by the said bonds respectively specially mortgaged certain landed property (which was therein described), and generally all his property both movable and immovable. That the deponent has not any mortgage, pledge, or security for his said demand save as aforesaid. That the property so mortgaged is not of the value of more than £3,000, and that the sum of £667 10*s.*, and interest, as aforesaid, remain wholly unsecured to the deponent. The deponent believes the said A. B. is about to remove, and is making preparations to remove from this said Colony, that the grounds of such belief are, that in an advertisement inserted in the *Commercial Advertiser* published this day, it is stated that A. B. (meaning the said A. B.) having taken his passage for Port Natal by the brigantine *George Henry Harrison*, the said vessel will meet with immediate dispatch. And the deponent has been informed by his attorney, John Reid, that the said A. B. had informed him that he intends to sail for Port Natal on or about Wednesday next.

In respect of this affidavit, the Master applied for and obtained a writ of arrest against the said A. B., issued under and in terms of the provision of the 8th Rule of Court, returnable on the 15th instant.

Information that this writ had been issued having reached the defendant before it was delivered to the Sheriff, an arrangement was this day entered into between the defendant and the plaintiff's attorney, whereby, in order to save

the expense of the execution of the writ, it was agreed that the arrest should be held as having been made,—that the defendant, under the provisions of the 135th Rule of Court, should anticipate the day of appearance, and apply to the Judges at Chambers this day to have the arrest dissolved, as not warranted in law under the circumstances of his case, and that the defendant should personally appear before the Judges at Chambers, and abide their decision thereon.

An application to the above effect was accordingly entered in the Chamber Book, in consequence of which the Chief Justice and Judge Menzies sat at Chambers, and were attended by the Attorney-General and Attorney Reid on the part of the plaintiff, and by the defendant personally.

The defendant, in support of his application, called on the plaintiff's attorney to produce two deeds, both executed by the defendant before the notary, Henry Reid, on the 15th October, 1845; and the same having been produced, accordingly were put in by the defendant.

In the one, the said A. B. declared "that whereas he, the appearer, was indebted to the said Clerke Burton, Esq., in his capacity of Master of the Supreme Court, in divers sums of money upon and by virtue of certain two mortgage bonds executed by the appearer, and whereas he has been appointed Recorder of the District Court of *Port Natal, to which he intends shortly to proceed*, and whereas the said Clerke Burton, in his said capacity, had requested him to appoint his *domicilium citandi et executandi* within this Colony; now, therefore, the appearer declared to appoint the office of John Reid, attorney-at-law, being No. 58, Church Street, Cape Town, to be such his *domicilium citandi et executandi*, at which office any summons, notice, writ, or other proceeding at law may be duly served upon the said John Reid as his agent for that purpose, and who is hereby authorized to accept service for him and on his behalf, declaring that the same shall be equally valid as if the same were served on him personally.

"Further, for him and on his behalf to appear to any action or actions, which the said Clerke Burton in his capacity may institute against him for recovery of the said debts, &c., and to suffer the Supreme Court, or any other competent court, to pronounce a judgment by default, or a sentence of willing condemnation to pass against him.

"At the same time, &c., &c., appeared the said John Reid, who did consent to such choice of *domicilium citandi et executandi*."

The other of the said deeds set forth that the said A. B, &c., *at present of Cape Town, but about to proceed to Port Natal*, declared "to have nominated, constituted,

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and appointed, as by these presents he doth nominate, constitute, and appoint, John Reid, &c., &c., to be his true and lawful attorney and agent irrevocably, for him, the appearer, and in his name and on his behalf, to sell either by public auction or by private contract, as his attorney shall see best, *all his immovable property situate within this Colony*, or any part thereof, for the best price, &c., &c., and to enter into any contract or contracts for the same with any person or persons who shall agree to be the purchaser or purchasers, and upon receipt of the amount of the purchase money to pay, so far as the proceeds shall extend, to Clerke Burton, Esq., Master of the Supreme Court, the amount which the appearer owes to him in his said capacity, upon and by virtue of certain mortgage bonds, &c., &c. (here the bonds mentioned in the affidavit were described), to pay the costs and charges incurred by the said Clerke Burton in his said capacity in certain proceedings instituted by him for the recovery of the same, and the expenses of this power of attorney and of any other deed which may be executed by the appearer which may be deemed necessary for the recovery of the said debt, &c., &c., &c., first deducting thereout all necessary charges and expenses attending the sale and disposal thereof, &c., &c., &c."

The deed then proceeded to grant to the said Reid power to make, subscribe, and grant all transfers and other deeds, and generally to do everything which shall be requisite and necessary to be done for the sale of the said property, and confirming the same to the purchaser, &c., &c.

The defendant then stated that, although his appointment had not yet been gazetted, he had been offered by the Government of this Colony, and had accepted, the office of Recorder of the District Court of Natal, and was about to proceed to Natal, solely for the purpose of performing the duties of that office.

(These facts were admitted by the plaintiff's Counsel.)

That it was thus proved that he was neither *in fugâ* nor removing to Natal for the purpose of defrauding or defeating his creditors in obtaining payment of their debts. That by the deed first above recited, he had placed the plaintiff in as good or even in a better situation than he would have been in if the defendant had, in order to be released from the arrest, found security *de judicio sisti*, and that therefore the plaintiff was not entitled to arrest the defendant in order to force him to give security *de judicio sisti*.

He quoted Ordinance No. 14, 1845, § 35, and maintained that, whereas, under its provisions, the process of this Court, in execution of any judgment given against him,

can be executed as effectually against all the property which the defendant may have at Natal as it can be against his property situated within the territory over which the jurisdiction of the Supreme Court directly extends, therefore the plaintiff could show no good cause why, in respect of the defendant's removal to Natal, he ought to be compelled by personal arrest to give the plaintiff security *judicatum solvi*, more especially as, by the deed second above mentioned, he had placed the whole of his immovable property, situated *within any part of this Colony*, completely at the disposal of the plaintiff, and as he had offered (which offer he now repeated) to execute any other deed which the plaintiff could point out as capable of giving him any further security over the defendant's property.

2ndly. He stated that after his appointment to the office of Recorder and his intended removal to Natal were made known to the plaintiff, and after the defendant had, with a view of obtaining funds for the payment of the defendant's debts, advertised a sale of his property preparatory to his removal to Natal, the plaintiff had served him with a summons, in order to obtain provisional sentence against him on the 12th October last for the debts which were the grounds of this arrest.

That he had thereupon represented to the plaintiff that the recovery of such sentence against him, followed, or threatened to be followed up, by an attachment of his immovable property, would either wholly prevent the sale of his immovable property, or at least cause it to be sold at a price much below its real value, to the prejudice of the plaintiff as well as of the defendant. That the plaintiff had, in consequence, agreed to withdraw, and had withdrawn that summons, on condition that the defendant should execute in his favour the two deeds above mentioned. That these deeds were prepared under the plaintiff's directions, executed by the defendant, and delivered to and received by the plaintiff, and were now in his possession; in consequence of which, he maintained that the plaintiff was barred *transactione* from of new commencing proceedings for the very same purpose, for which the former proceedings, now withdrawn, had been instituted, unless he could show that some change of circumstances had taken place since that transaction was entered into.

The *Attorney-General*, for the plaintiff, did not deny that, in consequence of the deeds above mentioned, and of the 35th section of the Ordinance No. 14, 1845, the plaintiff could obtain the judgment of this Court against the defendant for the debts in respect of which the writ

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of arrest had been obtained, and could carry that judgment into execution against the property of the defendant as easily and effectually, after the defendant's removal to Natal, as if he had remained in his present domicile; but he maintained that, as the process of this Court against the defendant for civil imprisonment, which the plaintiff was entitled to obtain against the defendant, in the event of his property proving insufficient to discharge the judgment, could not be put in execution within the district of Natal, this was a sufficient ground to entitle the plaintiff, by an arrest, to prevent the defendant from removing to Natal, until he should have given security *judicatum solvi*. 2ndly. He maintained that the only object contemplated by the parties in entering into the transaction was the withdrawal of the then existing action, and that it was not intended thereby to bar the plaintiff from instantly commencing any other action, or from, by an arrest, preventing the defendant from removing from the Colony until he should have given security *judicatum solvi*.

The Judges held that, in conformity to the principle established by the decisions in the cases of *Thompson* vs. *Andrews*, 14*th May*, 1842 (*ante, p.* 128), and *Roberts* vs. *Tucker*, 27*th May*, 1842 (*ante, p.* 130), the allegation in the plaintiff's affidavit, as to the defendant's being about to remove from the Colony by sea, was sufficient to warrant the issuing of the writ and the arrest *of the defendant* on it, but that there was a great distinction in law between the facts, which it was sufficient for the plaintiff to allege on oath, in order to obtain a writ of arrest, and by the arrest to prevent the defendant's leaving the Colony before the Judges should have an opportunity of considering the merits of the arrest, and the facts, which it was necessary for the plaintiff to establish to the satisfaction of the Judges, to prevent them from dissolving the arrest on the application of the defendant.

The Court held that the plaintiff, having admitted that the defendant was actually to proceed to Natal for the *bonâ fide* purpose of performing the duties of an office to which he had been appointed by the Government of this Colony, which, in truth, was really the creditor and plaintiff in this case, the fact of his temporary removal from this Colony, while at sea on his passage to Natal, was immaterial and irrelevant to the decision of this case, which must therefore be decided in the same way that it ought to be if the district of Natal were contiguous to the frontier of the other portion of the Colony, so that the defendant could enter it by stepping over the boundary line separating them. That as the district of Natal had, by Her Majesty's

Letters Patent, been annexed to, and made to form a part of, this Colony, the principles applicable to the case of a debtor removing to a foreign country were altogether inapplicable to this case. That, therefore, the only grounds on which the plaintiff could maintain his right to arrest the defendant in respect of his intended removal from his present domicile to Natal, were that, as this Court had no jurisdiction, at least in the first instance, over persons residing within that district, the defendant must be held to be removing himself out of the jurisdiction of this Court, and thus preventing the plaintiff from suing him and recovering judgment against him in this Court; and secondly, from being able to carry the judgment of this Court, even if he could obtain it, into execution.

The Court held that the first ground of objection was completely obviated by the deed first above mentioned, and that the second was equally obviated, in so far as respected the property of the defendant, by the 35th section of the Ordinance No. 14, 1845, and the deed second above mentioned. That in the law of this Colony, process of execution against the person of a debtor is not issued as a matter of course in respect of a return of *nulla bona* to satisfy any judgment which has been obtained against him, but is only granted *causa cognita*, after the debtor has been summoned to show cause against it. (*Vide* also Ordinance No. 6, 1843, Section 124.) And that there is no reason, either in law or equity, which can warrant this Court, by means of its process of arrest, to prevent an inhabitant of this Colony from removing from one part of it to another, namely, from this division of it to its other division, the district of Natal, merely because it is possible that at some future time a creditor of the party so removing may obtain from this Court a decree of civil imprisonment against him, and that the Legislature of the Colony have not deemed it expedient, that the process of this Court against the person of defendants should be executable within the district of Natal.

While, therefore, the Judges held that it would be competent for this Court, where a creditor established to its satisfaction that certain or even very imminent damage or loss would be occasioned to him by his debtor's removing to Natal, and so withdrawing himself from the personal process of this Court, to prevent that removal by an arrest of the debtor, until he should give security *judicatum solvi*, yet that the mere allegation, or even probability, that the creditor might hereafter be in a situation to obtain a decree of civil imprisonment, was not *per se* sufficient to warrant such an arrest. That every case of this kind must be judged

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and decided on its own merits, and in this case the plaintiff had not even alleged any loss or damage, which was likely, much less certain, to be occasioned by the defendant being suffered to remove himself beyond the reach of the process of this Court against his person.

The Judges held that even if in other respects the plaintiff had been entitled to have the arrest confirmed, yet that, for the reasons alleged by the defendant, he was barred *transactione* from now having recourse to the process of arrest against the defendant, because, having, with the knowledge of the defendant's intended removal to Natal, commenced an action against him for the recovery of the very same debts on which this arrest is founded, and on which he might have obtained judgment and execution, both against the property and person of the defendant, and having wholly withdrawn it in consideration of the defendant's executing (which condition has been fulfilled) the two deeds above mentioned, in both of which the defendant's intended immediate removal to Natal is set forth, and the obvious object and intent of both of which, especially the first, is to obviate the injurious consequences which that removal might occasion to the plaintiff, it is impossible to hold that, when the parties entered into that transaction, the withdrawal of the then subsisting action was the only consideration given to the defendant for executing those deeds. The Judges held that the deeds must be taken to have been executed on the mutual understanding not only that the action should be withdrawn, but that no proceedings should be taken by the plaintiff to prevent the defendant's removal to Natal, at least until some important change of circumstances should in the meantime occur. And the plaintiff has failed to show that any such change has taken place.

The Judges therefore held that the defendant was entitled to have the arrest dissolved both on the merits and in respect of the transaction. But as the defendant consented thereto, they would make the dissolution conditional on his executing any further deed, giving security over the defendant's property which the plaintiff may require.

NORDEN *vs.* OPPENHEIM.

Arrest. Rule No. 8.

What is a sufficient affidavit to found an arrest under above Rule, and what is a sufficient statement of cause of action in writ.

1846. May 19.

Norden vs. Oppenheim.

On the 8th May, the plaintiff had obtained a writ of arrest against the defendant, under the 8th Rule of Court, in respect of an affidavit then filed by him, which set forth that the defendant was justly and truly indebted to him in the sum of £500, as and for damage sustained by the plaintiff by reason of the defendant having, on or about the 5th of the present month of May, uttered certain false, scandalous, defamatory, and malicious words and expressions of and concerning the plaintiff, and to his great damage and injury; and that the plaintiff had lately been informed by the said H. Oppenheim himself that it was his intention to proceed to Europe, and that he was only waiting for the arrival of an agent to conduct the business of Messrs. G. Kilian & Co. in this town, at present managed by the said H. Oppenheim, and which information the deponent verily believes to be true; that on or about the 27th April last, one Kilian arrived in this Colony in the ship or vessel *Mary Anne*, now at anchor in Table Bay, and who, as this deponent hath also been informed and believes, is to act as such agent as aforesaid. And this deponent lastly saith that he verily believes that the said H. Oppenheim is now preparing to quit the Colony, and will not return again; and that in the event of such departure the deponent hath not any security, &c., &c.

The defendant was arrested on the writ, but released on finding bail, by consent of plaintiff, for £200.

The writ set forth the cause of debt as follows: "To answer, &c., &c., wherefore he hath not satisfied the said B. Norden his damages to the amount of £500, which the said B. Norden has sustained *in respect of certain false, scandalous, defamatory, and malicious words and expressions spoken of, about, and against the character of the said Benjamin Norden, on or about the present month of May, by the said H. Oppenheim*, in the presence and hearing of divers persons."

The defendant had served the plaintiff with a notice to show cause this day why the said writ of arrest shall not be quashed, and why the bail bond and proceedings thereon should not be set aside, with costs, on the grounds, amongst others, that the cause of action is not sufficiently set forth

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in the said writ of arrest, or affidavit to hold to bail; and also that the said affidavit upon which the writ was founded is not drawn in accordance with the 8th Rule of Court, as it does not sufficiently set forth the belief of the said plaintiff, or the grounds of such belief; and that the affidavit is in other respects uncertain.

After hearing *Ebden*, for the defendant, in support of the motion, the Court held that the cause of action was sufficiently set forth in the affidavit and writ, notwithstanding that neither the alleged defamatory words nor their substance or effect was therein set forth; and that the plaintiff's belief that the defendant was about immediately to leave the Colony, and the grounds of that belief, were sufficiently set forth in the affidavit, notwithstanding that the affidavit did not set forth *by whom* he had been informed that Kilian therein mentioned had come out to act as agent of Kilian & Co.

SECTION III.

CIVIL IMPRISONMENT.

NISBET & DICKSON *vs.* RICHARDSON.

An unconfirmed liquidation account, not being a final sentence, a decree of civil imprisonment for the deficiency refused; and where, per incuriam, a decree had already been granted at the instance of another creditor, the Court stayed execution. 1828. April 1.

[Vol. I, p. 298.]

MUTER *vs.* SATCHWELL.

Civil imprisonment. Jurisdiction of Resident Magistrate to decree.

Civil imprisonment on a sentence of the Resident Magistrate refused, Ordinances Nos. 33 and 44 giving Magistrates no jurisdiction to pass sentence on which civil imprisonment can be enforced. Sept. 4.

[Vol. I, p. 313.]

[But Act 20, 1856, now gives such jurisdiction.]

LANGEVELD *vs.* TYRHOLM.

Civil imprisonment. Sheriff's return of nulla bona.

Return of nulla bona sufficient prima facie proof of no movable property. It is then for defendant to prove his possession. Sept. 4.

[Vol. I, p. 314.]

NISBET & DICKSON *vs.* RICHARDSON.

Civil imprisonment. Appeal.

1830. Sept. 16. *Appeal not competent against a decree of civil imprisonment in execution of a judgment not appealed against. Civil imprisonment granted, notwithstanding petition for leave to such appeal.*

[Vol. I, p. 474.]

VILLIERS *vs.* RICHE.

1831. March 29. *An insolvent is entitled, after the liquidation account has been confirmed, to oppose a decree of civil imprisonment by objecting to the legality of the claim proved in his estate.*

[Vol. I, p. 518.]

IN RE HOFFLER.

Civil imprisonment. Ordinance 64, §§ 29 *and* 95.

May 2. *Civil imprisonment suspended during sequestration of an estate, and insolvent liberated.*

[Vol. I, p. 526.]

WOLFF *vs.* DE VILLIERS.

Civil imprisonment: what must be served on the defendant.

1832. March 20. *In an application for civil imprisonment, the defendant must be served with a copy of the sentence, as well as a copy of the writ and the Sheriff's return of nulla bona; and where a copy of the sentence had not been served, granted the defendant fourteen days to see it.*

[Vol. I, p. 24.]

VALENTYN *vs.* OLIVIER.

Civil imprisonment. Costs.

Creditor obtaining decree not entitled to costs.

1832. Dec. 31 — Valentyn vs. Olivier.

In respect of section 19 of the publication of the late Court, dated 3rd April, and published in the *Gazette* of the 10th May, 1823, the Court found that the plaintiff, obtaining a decree of civil imprisonment against a debtor, is not entitled to the costs of obtaining the decree from the defendant.

CURLEWIS *vs.* MESHAM.

Civil imprisonment.

Pluris petitio (over demand) does not vitiate summons as to what is really due.

1833. Feb. 28. — Curlewis vs. Mesham.

The Court granted decree of civil imprisonment for the amount of the sentence, on which it was claimed, with the interest properly due thereon from 1831, notwithstanding that in the copy of the summons served on the defendant, interest was, by mistake, claimed from 1811, instead of 1831.

TWENTYMAN AND ANOTHER *vs.* HEWITT.

Feb. 28.

Where a husband had failed to carry out one of the provisions of a notarial deed which the Court had decreed to be executed, and in which the trust had been accepted by one only of three intended trustees, the Court, by a majority [MENZIES, J., *and* KEKEWICH, J.; WYLDE, C.J., *dis.*], *held that a claim for civil imprisonment could be maintained by this one, without his intended co-trustees, to enforce compliance with the terms of the decree.*

[Vol. I, p. 156.]

DUQUI *vs.* BERGH.

Civil imprisonment. Summons. Variance.

B., as executor of K., obtained judgment in his capacity against D., and sued out the writ in his capacity. Thereafter, in his individual capacity, he obtained a decree of civil imprisonment. D. sought to set aside the decree on that ground, but unsuccessfully.

1833. Dec. 24. — Duqui *vs.* Bergh.

Stoll moved to make absolute a rule on Bergh, to show cause why a writ of civil imprisonment should not be set aside, because the judgment, in execution of which the writ was issued, was obtained by Bergh in his capacity as executor of Kotzé, while the summons for civil imprisonment was at the instance only of the said Bergh as an individual, and not in his capacity aforesaid.

The Court, without hearing *Cloete*, for Bergh, discharged the rule with costs.

DICKSON *vs.* RICHARDSON.

Proceeding, form of, in revival of civil imprisonment.

Decree of civil imprisonment having been obtained by a partnership firm, and one of the partners having died before its execution, the decree was revived, after special summons, in the name of the surviving partner. Such revival cannot be had on motion.

1834. May 12. Aug. 1. — Dickson *vs.* Richardson.

James Nisbet and William Dickson, trading under the firm of Nisbet & Dickson, on the 14th September, 1830, obtained a decree of civil imprisonment against James Richardson, until he should pay and satisfy the said James Nisbet and William Dickson, co-partners as aforesaid, the sum of £2,714 2*s.* 1*d.*

In execution of this decree, five several writs were issued, to all of which the Sheriff made a return of *non est inventus*. A sixth writ was issued, and the defendant was taken and lodged in prison, but this arrest was quashed by the Court as illegal, and the defendant released. A seventh writ was afterwards issued on the 4th July, 1833, but nothing was done thereon. Thereafter a suggestion was put on record by William Dickson, that since the judgment aforesaid was pronounced in this cause for the civil imprisonment of the person of the within-named James

Richardson on the 2nd day of March, 1833, the within-named James Nisbet died. and the said William Dickson then survived him, and became the sole representative of the said firm of Nisbet & Dickson.

On the 19th March, Dickson's attorney caused Richardson to be personally served with a copy of the above suggestion, and a notice that the Court would be moved on the 29th day of April next (unless he should then show cause to the contrary) that a writ for civil imprisonment should be issued against him in the name and on the behalf of the said William Dickson, as sole surviving partner of the late firm of Nisbet & Dickson, upon the said judgment of the 14th September, 1830.

This motion was postponed till this day, when it was made by the Attorney-General, who produced an affidavit proving Nisbet's death, and that Dickson was the sole surviving partner of the firm.

Cloete, for Richardson, *inter alia*, objected that, according to the law of Holland, such an application could not be made by motion with merely a previous notice, but that defendant must be regularly summoned in virtue of a formal summons issued by the Court and duly served on him.

After argument, the Court ordered that the present application be refused, with costs.

Thereafter the following summons was served on Richardson:

"William, &c.,—

"Whereas, by a certain judgment, &c., bearing date the 14th September, 1830, made in a certain cause then and there pending, wherein J. Nisbet and W. Dickson, trading under the firm of Nisbet & Dickson, were plaintiffs, and James Richardson, &c., was defendant, civil imprisonment was decreed against the person of him, the said James Richardson, until he should have satisfied and paid the said J. Nisbet and W. Dickson, co-partners as aforesaid, the sum of £2,714 2*s.* 1*d.*, together with interest, &c., &c. And whereas, since the day of the date of the said judgment, and by virtue thereof, divers writs have from time to time been issued, &c., commanding you to take the said J. Richardson, if he should be found in our Colony, and him safely keep, &c.; and whereas you have, as further commanded from time to time, made your return on the said writs of *non est inventus;* and whereas the said J. Nisbet departed this life at Blackheath, &c., on the 2nd of March, 1833, and the said W. Dickson thereupon became the sole surviving partner and representative of the firm of Nisbet & Dickson; and whereas, although

1834. May 12. Aug. 1.

Dickson vs. Richardson.

judgment be given as aforesaid, yet execution of the same still remains to be made. Now, therefore, we command you that you summon the said J. Richardson, that he appear before, &c., of Supreme Court, to show cause, if any, why the said judgment shall not be revived in the name and in the behalf of the said W. Dickson, as sole surviving partner of the said late firm of Nisbet & Dickson, and why a writ for the civil imprisonment of him, the said James Richardson, shall not issue in the name and on the behalf of the said W. Dickson, in his aforesaid capacity, to have effect until he, the said J. Richardson, shall have satisfied and paid the said principal sum of £2,714 2*s.* 1*d.*, &c.; and serve on the said J. Richardson a copy of this summons, the said judgment, and of an affidavit, &c., whereon the said claim is founded, and return, &c."

On this day, 1st August, 1834, the *Attorney-General*, in respect of the said summons, moved that the decree of civil imprisonment granted to Nisbet and Dickson, and now become ineffectual by the death of Nisbet, should be revived in the name of Dickson, the surviving partner, and quoted *Gow, pp.* 377, 143, 374, to show that Dickson, as surviving partner, is entitled to make this application without the representatives of Nisbet joining in it, and was entitled to have the application granted. (*Vide Tidd*, 2, *p.* 1,119.)

Cloete, contra, admitted that a surviving partner was entitled, without the joinder of the representatives of the deceased, to institute actions for the recovery of nomina due to the firm (*Cod.* 3, *tit.* 8, and *Pothier on Partnership*, 9 *Cap.*, § 4), but quoted *ff.* 17, 2, *l.* 4, to show that judgments having been obtained in the name of both parties, execution could not issue in the name of the survivor alone.

The Court unanimously revived the decree, and granted the application as prayed.

INGRAM AND BROTHERS *vs.* THEUNISSEN.

Civil imprisonment. Summons.

Summons for civil imprisonment must aver issue of writ, of execution on judgment, and Sheriff's return of nulla bona.

1834. Dec. 16.

Ingram and Brothers *vs.* Theunissen.

The Court sustained the objection to the summons in this case, which prayed for civil imprisonment, and set forth that the defendant was indebted to the plaintiff in certain sums upon and by virtue of a provisional sentence, but did not aver that a writ had been taken out in execution of the sentence, and that the Sheriff had made a return of *nulla bona* therein.

BERGH, Q.Q., *vs.* STADLER.

Civil imprisonment.

Debtor must point out to the Sheriff all his disposable property.

1835. May 30.

Bergh, *q.q.*, *vs.* Stadler.

This was an application for civil imprisonment against defendant.

Plaintiff produced the sentence, writ of execution, and return of the Sheriff of *nulla bona.*

Defendant objected that he was the proprietor of slaves, valued by the valuators, under the Emancipation Act, at £796 5*s.*, and that the Sheriff ought to have attached and sold the defendant's claim to the compensation for those apprentices and his right to their services, before making the return of *nulla bona;* but he did not aver that he had ever pointed out this alleged property to the Sheriff, and he admitted that the slaves had been mortgaged for £450.

The Court (WYLDE, C.J.) held that defendant had not proved that he had disposable property, by the attachment and sale of which any part of his debt to the plaintiff could be satisfied, and therefore gave decree as prayed.

BONIFACE AND LEY *vs.* DE LIMA.

Civil imprisonment: decree of, refused.

1836. May 17.

Boniface & Ley *vs.* De Lima.

In this case, the defendant was summoned to show cause why a decree of civil imprisonment should not be issued against him for payment of a sum of £8 14*s.* 1*d.*, due to the plaintiff upon and by virtue of a certain rule or order of the Supreme Court, obtained by the plaintiff against the defendant, the said rule having been carried into execution by a certain writ, sued out against the goods and chattels of defendant, upon which the Sheriff had made a return of *nulla bona.*

1836. May 17. — Boniface & Ley vs. De Lima.

The rule was in the following terms: "It is ordered that the plaintiff—now defendant (*vide supra inter eosdem, 3rd February*, 1835) be allowed to purge his default and to file his declaration, upon payment of the costs incurred by his said default and of this application."

Defendant did not appear.

Upon a question from the Court, *Brand*, for the plaintiff, stated that the defendant in this case had never filed his declaration.

The Court refused the application, in respect that the order made by the Court only allowed the defendant a certain relief, upon the condition of his paying costs; that the order for payment of costs was only conditional, and as the condition had not been purified, the rule was not absolute; that it did not contain any positive order that costs should be paid by this defendant; that, therefore, a writ should not have been issued against the goods of defendant in execution, and that a decree of civil imprisonment could not now be granted.

VAN DER BERGH *vs.* DE LIMA.

Civil imprisonment. Costs.

A decree of civil imprisonment refused where the costs of a former unsuccessful application for civil imprisonment had not been paid.

1837. Feb. 7. — Van der Bergh vs. De Lima.

This was an application for civil imprisonment. A former application for the same object had been dismissed for some irregularity, with the costs of *comparent* to defendant.

On the motion of defendant, the present application was also dismissed with costs, in respect that the costs of the former application had not been paid or tendered to defendant.

VAN DEN BERG *vs.* VAN DYK.

Civil imprisonment. Summons. Misjoinder.

1838. Nov. 30. — *Summons for civil imprisonment held bad for misjoinder, where founded on two separate judgments against two defendants in two separate actions, although for the same debt.*

[Vol. I, p. 126.]

SCHMITZ *vs.* OLIVIER.

Civil imprisonment. Assignation. Surety.

Civil imprisonment decreed at instance of assignee of only half the debt which such assignee had paid in his capacity as surety and taken cession of.

1839.
May 28.

Schmitz vs.
Olivier.

The defendant was indebted to Van der Walt in the sum of £90 0*s.* 6½*d.* by a bond, in which plaintiff and another were sureties for defendant.

Defendant's estate was placed under sequestration.

Van der Walt claimed and was ranked on the estate as a creditor for said debt on the said bond, which was filed in the estate.

Nothing was awarded to Van der Walt in the liquidation and distribution of defendant's estate.

Van der Walt claimed payment of one half of the debt from plaintiff as surety (the other surety was insolvent). Plaintiff paid Van der Walt the half amount of £45 0*s.* 3*d.*, and received from him an acknowledgment of such payment and the following cession: "I do hereby cede and transfer the said sum of £45 0*s.* 3*d.*, and interest thereon as aforesaid, and all my right and title thereto, to the said J. L. Schmitz, his order, heirs, administrators, or assigns."

Plaintiff afterwards, having duly summoned Olivier, the defendant applied to the Circuit Court of Graaff-Reinet for a decree of civil imprisonment in the terms of the 95th section of Ordinance No. 94.

WYLDE, C.J., having some doubts whether the cession of only half the original debt was sufficient to entitle the plaintiff to apply for civil imprisonment in the same way that the original creditor might have done, removed the case to the Supreme Court.

The Court held that the cession entitled the plaintiff to apply for civil imprisonment, and gave decree of civil imprisonment accordingly.

BRINK AND ANOTHER *vs.* DE VILLIERS.

Civil imprisonment.

Decree of civil imprisonment granted in 1840 *on a judgment obtained in* 1834, *the execution and return of nulla bona on which judgment were also made in* 1834, *although it was objected that the judgment was superannuated and should be revived.*

1840. Aug. 1. — Brink & Another vs. De Villiers.

The Court this day granted decree of civil imprisonment, in respect of a judgment given against defendant in 1834, the return of *nulla bona* on the writ in execution of which was also made in 1834, notwithstanding it was objected that as more than a year had elapsed since the date of the judgment, or at all events since the return of *nulla bona*, decree of civil imprisonment could not be given in respect of this superannuated judgment, until it had been revived. (Same done in *Randall* vs. *Rex*, 2nd November, 1840.)

BLAKE *vs.* BARROW.

Civil imprisonment.

Half-pay officer B. obtained damages against a half-pay officer, for slander. The latter surrendered his estate without satisfying B.'s claim. B. prayed civil imprisonment and proved that the defendant's half-pay was £91 5*s. per annum. The Court, in the circumstances of the case, granted a decree, execution to be stayed upon quarterly payments of* £10.

1842. April 12. — Blake vs. Barrow.

On the 23rd June, 1841, plaintiff obtained judgment against the defendant for £200 damages (with £48 odd taxed costs) in respect of a most slanderous and malicious libel published by defendant against plaintiff, and which defendant had attempted, but completely failed, to justify.

As soon as the plaintiff took out his writ in execution of the above judgment, defendant surrendered his estate as insolvent. He swore that he had not, and there was no proof that he had, any property except his half-pay as lieutenant in the Navy. On the liquidation of defendant's estates no dividend was awarded to plaintiff in respect of the above judgment. Plaintiff this day moved for a decree of civil imprisonment against defendant in terms of the 95th section of Ordinance No. 64.

Musgrave, for the defendant, opposed the motion, and stated that defendant had a wife and three children, and had nothing wherewith to support them except his half-pay, and contended that therefore the Court ought not to grant the decree for the purpose of compelling him to give up any part of his half-pay to plaintiff, especially considering the nature of plaintiff's debt. He referred to the law of England to show that defendant's half-pay was not assignable, and to 7 Geo. IV. (57, § 29), regulating the discharge of insolvents, by which it was enacted that the Insolvent

Court on discharging a debtor could not award any part of his half-pay to his creditors, except such portion as should be approved of by the Lords of the Admiralty or the Secretary of War respectively. On these grounds he contended that if the present application were made to force defendant to surrender part of his half-pay to plaintiff, it ought not to be granted; and that if not made for this purpose, it could only be made to gratify the vindictive feelings of plaintiff, and on that ground also should be rejected.

Attorney-General, contra, maintained that, so far from the nature of the plaintiff's debt being a ground for refusing civil imprisonment, it was, on the contrary, a reason for granting it, and referred to the law of England, which provides that it shall not be competent for an insolvent debtor, imprisoned in respect of damages recovered against him for malicious slander, to petition for his discharge until he shall have suffered imprisonment for three years, nor when he had opposed the claim of his creditor vexatiously, and caused him unnecessary expense by groundless litigation until he shall have suffered imprisonment for three years; and contended that as defendant's debt to plaintiff was for damages for malicious slander, and for the costs which defendant had caused plaintiff to incur by his vexatious opposition to plaintiff's claim and groundless litigation, the Court ought to grant civil imprisonment on these grounds alone. He also maintained that the application ought to be granted, in order to compel defendant to give a part at least of his half-pay to plaintiff, because the defendant's wife possessed an income arising from property settled on her exclusively by an *antenuptial* contract of marriage, sufficient to support the defendant, herself and family.

The plaintiff was not able to prove the amount of this separate income, the existence of which was not denied by defendant. The Court held that as defendant refused to show what the amount of it was, there were legal grounds for presuming that it was sufficient for the support at least of defendant's wife and [children. The Court held that the Ordinance placed it entirely in the discretion of the Court to grant or to refuse civil imprisonment, according to the circumstances of each particular case; and that although they would in no wise grant it merely to gratify the vindictive feelings of the creditor, and might in some way refuse to grant it for the purpose of compelling the debtor to assign any part of his half-pay, yet that for the reasons assigned by the Attorney-General, this was a case in which it ought to be granted; and therefore gave the decree of

1842. April 12. — Blake vs. Barrow.

civil imprisonment unconditionally, notwithstanding the defendant's offer to pay £30 out of his half-pay of £91 5*s.*; and refused to suspend it *hoc statu* on any other terms than security given by the defendant to pay plaintiff £10 quarterly; and if plaintiff should hereafter succeed in proving that defendant's wife's separate income was sufficient for the support of defendant as well as that of herself and children, declared they would not suspend it unless defendant should give up the whole of his half-pay to the plaintiff until the debt and costs were discharged.

Dickson & Co. *vs.* Rogers.

Civil imprisonment. Half-pay and pension—what proportion claimable by creditors.

Where a defendant against whom civil imprisonment was sought was in receipt of a pension of £485 per annum, the Court stayed execution of the decree on the payment of £250 per annum.

1846. Dec. 14. — Dickson & Co vs. Rogers.

The plaintiffs in this case claimed a decree of civil imprisonment against the defendant for the sum of £753 16*s.* 4*d.*, being the deficiency of the debt which the plaintiffs had proved in the insolvent estate of the defendant, and which the liquidation account of said estate, confirmed by the Court, showed that there were not assets of the estate to discharge.

The defendant put in an affidavit, stating that his income consisted of a colonial pension of £400, and his half-pay as major produced a net sum of £85. He offered to use his best endeavours to sell his commission as major, and after deducting as much of the price as would secure to his widow her pension as widow of a major, to pay over the balance to his creditors, and, until the sale of his commission should be effected, to pay his creditors £200 per annum. The plaintiffs objected to the sum as too small.

The Court granted decree of civil imprisonment as prayed, with stay of execution on condition of the defendant paying £250 per annum for the benefit of his creditors, and entering into a written obligation to use his best endeavours to procure the sale of his commission *quam primum*. This arrangement to take effect from the 1st of June last, when his pension from the Colonial Government, which had been detained to discharge a debt due by him to that Government, had again become available to him.

SUTHERLAND *vs.* BIRD.

Civil imprisonment. Salary, what proportion claimable by creditors.

Where a defendant against whom civil imprisonment was sought in receipt of a salary of £140 per annum, the Court stayed execution of the decree on the payment of one third of such salary, in quarterly instalments.

1847.
Feb. 4

Sutherland *vs.* Bird.

This was a claim for civil imprisonment for a debt of £18 12*s.*, to pay which the liquidation account of the insolvent estate of Bird proved that there was a deficiency of assets in the estate. The defendant put in an affidavit stating that he was a clerk in the Ordnance Department, with a net salary of £140 per annum, and could only afford to allow £40 of it in discharge of his debts.

The plaintiff insisted that the defendant should be compelled to allow one half of his salary for that purpose.

The Court held that one third was, under the circumstances of the case, a fair proportion of his salary to be distributed among his creditors; and gave judgment of civil imprisonment, as prayed,—to be suspended on payment, quarterly, of one third of his net income to the trustee on his insolvent estate; with costs.

CHAPTER III.

ARBITRATION AND AWARD,

SCHMIDT *vs.* FRANCKE.

1828. Sep. 17 — *An agreement to submit all future disputes to the arbitration of uncertain persons cannot be enforced by the Court, unless the parties have themselves, in the agreement, assessed the amount of damages for non-performance.*

[Vol. I, p. 334.]

WELLS *vs.* MACKENZIE.

1829. June 30. — *Indemnification from the plaintiff ordered by arbitrators to be given to a defendant means merely his personal indemnification, and not good security from third parties to indemnify.*

[Vol. I, p. 379.]

DIETZ *vs.* POHL.

Sep. 10. — *Award set aside (after being made a rule of Court, and writ of execution issued, but without notice to applicant, the deed of stipulation not stipulating non-notice) for certain informalities in the appointment of umpire and in the hearing of the case in the absence of one of the parties.*

[Vol. I, p. 397.]

ORPHAN CHAMBER *vs.* CLOETE.

An agreement by a principal debtor to refer certain accounts to arbitration does not foreclose his surety from debating such accounts.

1833.
June 26.
Aug. 28.

Orphan Chamber vs. Cloete.

The declaration set forth that the defendant bound himself as security *in solidum* and co-principal debtor, by private deed, dated 3rd September, 1818, for the prompt payment and reimbursement of such a sum of money as upon the liquidation of the aforesaid estate of the late S. van Breda, widow of H. O. Laubscher, should appear that Pieter Laubscher, one of the heirs in said estate, might be indebted to the same, over and above the amount of his portion, to which he is entitled in said estate. That the aforesaid estate having been liquidated, it appeared that the said Pieter Laubscher stood indebted to the plaintiffs *q.q.* in a balance of £396 8*s.* 6⅜*d.* over and above to what he is entitled in the said estate as aforesaid, and which balance was struck on the 27th May, 1831, and which defendant is lawfully indebted to, and unjustly detains from, the said plaintiffs.

In his plea, the defendant, *inter alia*, pleaded that, even were the defendant liable for such sum as might lawfully be claimed by plaintiffs from the said P. Laubscher, he, the said defendant, is not liable for the sum of £396 8*s.* 6⅜*d.*, as claimed by the said plaintiffs, or in any part thereof, for the said defendant saith that the liquidation accounts framed by the said plaintiffs in the estate of the late Widow H. O. Laubscher have not been approved of by the said P. Laubscher, nor by the said defendant, but, on the contrary, the said defendant saith that the liquidation accounts, as framed by the said plaintiffs, are erroneous, and ought to be amended on the following items, and which items the defendant maintained he was entitled to dispute and debate.

In their replication, the plaintiffs said that the defendant is no longer entitled to make any debate against the accounts of the estate of the late Widow Laubscher, closed on the 31st May, 1825, and 23rd October, 1830, because they say that the said P. Laubscher, having made some objections against the aforesaid account, dated 31st May, 1825, did submit the same to the arbitrament of the Orphan Board, by a notarial deed of submission dated 6th January, 1828, whereby he did declare to submit himself to such final account as the said Orphan Board should conscientiously, and for the interest of all parties, deem fit to frame, renouncing from all and every appeal, revision, or

1833. June 26. Aug. 28.

Orphan Chamber vs. Cloete.

recollement of account, upon which reference the said Orphan Chamber have duly decided, confirming the account as then made out, and of which decision the said plaintiffs have given due notice to the said P. Laubscher by letter, dated 7th May, 1829; wherefore the plaintiffs say that the said defendant, as surety to the said P. Laubscher, is no longer entitled, by right or otherwise, to debate said liquidation account, or any part thereof, or to demand any revision, recollement, or amendment of the same; whereupon the said plaintiffs also join issue with the said defendant.

In his rejoinder, the defendant pleaded that he is not barred from debating the account rendered by anything contained in the deed of submission, dated 6th January, 1828, for the said defendant saith that as a surety he is not at law barred from debating the said account by reason of the submission of the parties recited in the said deed.

In support of their objection to the defendant's right to debate, founded on the submission, the plaintiffs quoted *Pothier on Contracts, vol.* 1, *p.* 380; *Voet*, 46, 1, 16.

The Court, in respect of the principle stated in *Voet*, 44, 2, 5, without hearing *Cloete*, for defendant, decided that defendant was not foreclosed by the submission from debating the account.

Postea (28th August, 1833).—The parties proceeded to debate the disputed items in the account accordingly.

GROENEWALD *vs.* SMITH.

Award, what necessary to its being made a rule of Court.

Umpire, award set aside for irregularities by, viz., non-notice to one of the parties, and founding his decision on the notes taken by the arbitrators, without himself hearing the witnesses.

1838. Nov. 13. „ 27.

Groenewald vs. Smith.

A clause in a deed of submission to arbitration made extrajudicially *nullâ lite pendente* between the parties, whereby "they covenanted and agreed that the award should be made a rule of Court," together with or (even *without*) a clause "appointing any two of the practitioners before said Court, the one to pray and the other to consent to a condemnation in terms of the award" (*vide Voet*, 4, 8, 23, 24; *Merula*, 1, 7), was held sufficient to entitle either party

on motion to have the award made a rule of Court without the consent of the other, unless the motion were opposed in respect of objections to the validity of the award itself, which must be stated *instanter*.

1838. Nov. 13. „ 27. — Groenewald *vs.* Smith.

November 27.—An award by the umpire was set aside at the instance of one of the parties, although the other supported the award, because it had been given by the umpire without notice to, or an opportunity of objecting having been given by him to, and without the consent, either express or tacit, to his doing so by, the objecting party; on the notes of the evidence taken by the arbitrators, and without the umpire either himself examining the witnesses or hearing the parties; and this even although both parties may have been informed by the arbitrators that, in consequence of their disagreement, the decision of the matter in dispute had been by them referred to, and so devolved on the umpire; such information so given not being equivalent to notice to the parties from the umpire to take the proper proceedings before him. (Same found *Wood* vs. *Gilmour*, *March* 12, 1840; *Fryer* vs. *King*, *August* 29, 1843. See next cases.)

Wood *vs.* Gilmour.

Award set aside where umpire gave his award, without notice to the parties, on the evidence taken by the arbitrators.

1840. March 12. — Wood *vs.* Gilmour.

Cloete applied to the Court to set aside an award made by the umpire in a submission which had been entered into between Wood and Gilmour, after, in terms of the conditions of the submission, the arbitrators had remitted the matter to the umpire, on the ground that the umpire had immediately given his award on the evidence which had been taken by the arbitrators, without giving any notice to either party, so as to have enabled them to have insisted on being allowed to lead evidence, or to be heard before him.

The Court (Kekewich, J. absent), on the grounds laid down in *Groenewald* vs. *Smith*, *November* 27, 1838 (last case), sustained the objection, and set aside the award with costs. (*Vide also Fryer and Others* vs. *King*, next case.)

FRYER AND OTHERS *vs.* KING.

Award set aside where made by umpire without notice to parties. Where the award so set aside on the 29th August, and the reference lasted till the 30th September, it is not competent to remit the matter to the same arbitrators on the same reference, to make a new award.

1843. Aug. 29. — Fryer & Others vs. King.

On the motion of the *Attorney-General*, for King, the Court set aside an award made by the umpires, on the ground that it was proved that the award had been made by the umpires without notice to the defendant, King, that they were about to proceed to give their award, so as to enable the defendant to apply to the umpires to take evidence on his part, or to be heard on the evidence which had been taken by the arbitrators.

Plaintiffs to pay defendant's costs of the motion. (*Vide Groenewald* vs. *Smith, November* 13, 1838; *Wood* vs. *Gilmour, March* 12, 1840.)

Ebden, contra, quoted *Hall* vs. *Lawrence, 4th Term Rep., p.* 589; *Watson on Awards, pp.* 84, 89, 236, 237; *Caldwell on Awards, p.* 68.

There were four other objections made to the validity of the award, none of which were considered or decided on by the Court.

After the above decision had been given, *Ebden* quoted *Watson on Awards, p.* 83, and contended that the award having thus been declared null and void, the case was now in the same situation in which it would have been if no award had yet been made by the umpires, and, therefore, as the reference had been made a rule of Court, and as the time for making the award allowed by the referee did not expire until the 30th September, the Court ought now to remit the case back to the umpires for their award.

The Court refused so to remit the case, or on the present motion to decide as to the validity of any award which the umpires might hereafter make, leaving it to plaintiffs to take their own course, and if they should obtain a new award from the umpires, to apply hereafter, if they saw cause so to do, for the judgment of the Court as to the validity of such award. (None of the Judges had, however, any doubt that such new award would not be valid if objected to by the defendant.)

TWENTYMAN *vs.* CHISHOLM.

Arbitration. Revocation.

It is not competent for one of the parties to a submission to revoke and cancel it invito altero.

Where, by a clause in the deed of submission, the parties bound themselves to attend and produce such books as may be in their respective possession or power, touching the matters in difference, held that this only referred to such books, &c., as the arbitrators required.

Defect in award for want of finality, and for having been made in the absence of one of the parties, cannot be taken advantage of before Supreme Court where parties have renounced appeal, unless such renunciation first shown to be invalid.

It is competent for the Court to sustain an award in part, and set it aside in part.

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The parties in this case had carried on business in Cape Town under the firm of L. Twentyman & Co. This partnership was dissolved, and Twentyman claimed from Chisholm certain large sums of money as due to him by Chisholm in respect of the said partnership concern. Chisholm, on the other hand, denied that he owed these sums, and alleged that Twentyman was indebted to him in about £5,000 as his proportion of profits during the period of the said partnership.

Twentyman commenced certain actions against Chisholm to render an account, and to pay him the sums alleged to be due to him by Chisholm in respect of the said partnership. Thereafter the parties executed a deed of submission, by which they "in the most absolute and irrevocable manner submitted the account and claims hereinbefore mentioned, together with all other matters in difference arising thereout, or otherwise incident thereto, to the final award, arbitrament, and determination" of R. W. Eaton, T. Sutherland, and T. Ansdell.

This deed of submission contained the following among other clauses: "And they, the appearers, do hereby mutually covenant, &c., &c., that they will, when required, attend the said arbitrators for the purpose of giving such explanation, adducing such witnesses, and producing such books, papers, documents, and writings, as may be in their respective possession or power, touching the matters in difference, &c., &c. And the appearers do hereby further

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covenant, &c., &c., that they will well and truly abide, perform, fulfil, and keep as well any order as the final determination, arbitrament, and award of the said arbitrators, provided the same be made in writing and duly signed by them on or before, &c., &c. (a certain period therein specified), &c., &c. And the appearers do hereby mutually renounce all right of reduction, reformation, or appeal from such order, or final award, to follow thereon to the Supreme Court of this Colony; and do further covenant, &c., &c., that these presents and the submission hereby made, and any order or award which may be made in consequence thereof, shall be made a rule or order of the said Supreme Court, to the end that all the matters in difference between the said parties be finally concluded thereby; and for that purpose hereby appointing any two of the attorneys of the said Court, the one to pray and the other to consent to a condemnation according to law, &c." The three arbitrators named in the said deed accepted the submission to them, and, after certain proceedings, made out in writing and duly signed their award, within the period stipulated in the deed of submission.

This day, *Ebden*, for the plaintiff, put in the award, and moved that it should be made a rule of Court.

The *Attorney-General* and *Brand*, for the defendant, opposed the motion, and moved that the award should be set aside.

They put in a deed executed by the defendant before a notary, on the 25th July, 1845, which set forth, *inter alia*, that before and at the execution of the deed of submission, he had given notice to Twentyman and to the arbitrators that he required the production of all original books and papers kept by Twentyman, or his clerk in London, relating in any way to the affairs of the late firm of Twentyman & Co., for his examination, to enable him to resist the claim of Twentyman, inasmuch as the said original books and papers were necessary to show what sums had been paid by Twentyman for the goods with which he had charged the firm of Twentyman & Co., and without which the same could not be ascertained; that he had repeatedly required the production of the said original books and papers whilst the arbitrators have been engaged upon the matters of the submission, but that the arbitrators had stated at divers times to him that they do not see any occasion for delaying the proceedings until the said books and papers should be procured from London; and that they would proceed with the case before them on such evidence as may be in their possession; that the said original books and papers have not been produced,

and that the arbitrators, for the reasons aforesaid, could not justly determine the matters referred to them by the submission. Wherefore he, the defendant, did thereby revoke, cancel, and make void the said deed of submission, and all other deeds or acts whereby the said arbitrators are authorized and empowered to make any award, &c., in the matters referred to them in the said deed of submission, and did thereby require the said arbitrators not to proceed further in the investigation of, or to make any award, &c., in the matter referred to them.

It was admitted that this deed of revocation had been intimated on or about its date to the arbitrators.

They then maintained, first, that the defendant had, by law, an absolute right of his own mere motion, and without cause assigned, to revoke the submission at any time before the award was made; and quoted *Voet*, 4, 8, § 3; *Domat*. 2 *tit*. 7, § 1, *sub* § 7; *Digest*, 4, *tit*. 8, *l*. 7. They maintained that a submission is a mandate to the arbitrators, *severally* made by *each* of the parties; and that, therefore, although perhaps a joint mandate, given jointly by two parties, could not be revoked by one of the mandants without the consent of the other, yet that a submission, which they contended was not of the nature of a procuration *in rem suam*, was severally revocable by either of the parties (*vide Voet*, 17, 1, 17); and in illustration referred to *Walsh* vs. *Whitcomb*, 2*nd Espinasse*. They admitted that a mandate given by A to B, at the instance of C, and in respect of a consideration given by C, or by which an interest is given to C, is not revocable by A without C's consent; but contended that the principle on which such a mandate is not revocable does not apply to the case of a submission; and in illustration referred to *Milne* vs. *Greaterex*, 7 *East*, 608. They quoted *Van der Linden, Jud. Pract*., 2*nd vol*., *p*. 233, to show that a mandate to consent to judgment by one of the parties to an action is revocable by him, although containing a clause that the mandate should be irrevocable, unless where such mandate partakes of the nature of procuration *in rem suam*. They commented on *Voet*, 4, 8, §§ 25, 26, and maintained that the words *renunciatum est*, *renunciatio*, and *renunciationem*, used in these clauses, had reference solely to the renunciation of the right of reduction of the award, and not to the renunciation or revocation of the submission itself. They maintained that the law of arbitration in England, as it originally stood, was solely derived from and founded on the civil law; and that, therefore, although the decisions of the English Courts might not strictly be binding on this Court, yet they must be received as

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authorities entitled to the greatest weight in so far as they interpreted that law. They referred to *Cooke's Reports, part* 8, § 81, 13; *Vinnior's Case*, and *Watson on Awards, pp.* 21, 31; and *Stephen's Nisi Prius*, 1 *vol., p.* 143, as proving that the Courts in England, in respect of and in conformity to the interpretation put by them on the rules and principles of the civil law, had decided that every submission is revocable by either of the parties, even although it contained a clause providing that it should be irrevocable. And that as the statutes of the 9 and 10 William III, cap. 15, and 3 and 4 William IV, cap. 42, § 39, by which alone any restriction was created on the power of a party to a submission revoking it even when declared *in gremio* to be irrevocable, confessedly did not apply to and had no force within this Colony, it followed that the law of this Colony must at the present day be the same with what it had been shown the law of England was before these statutes had been passed.

Ebden, for the plaintiff, maintained that, admitting that the statutes of William III and William IV, referred to by the defendant, did not extend to this Colony, and that previously to their enactment, the law of England had been such as the defendant had stated it to be, yet that the decisions quoted by defendant, by which the law of England as to the power of parties to revoke submissions had been established, were not founded on, but, on the contrary, were in direct opposition to, the principles recognized in the civil law; and consequently that no respect ought to be paid in this case to the English authorities on the subject. That the parties executing a submission by the civil law stood, with reference to the arbitrator, in the relation respectively of *joint* mandants and mandatory; and consequently that one of those joint mandants could not revoke the mandate without the consent of the other. And, further, that in so far as regards the relation in which the parties who have entered into a submission stand with respect to each other, a submission is by the civil law deemed to be, and given effect to as, a bilateral contract, entered into by the parties for a consideration mutually given (namely, their respective abandonment of their right to resort to judicial proceedings for the decision of the matters in difference between them, and referred to the arbitrators), and therefore is not revocable by one of the parties *invito altero*, even although the deed of submission contained no clause declaring the submission to be irrevocable. Accordingly, there is no case mentioned in the authorities on the civil law in which a submission may be revoked, except that stated in *Voet*,

4, 8, 13. By the Roman law, a party refusing to obey the award of the arbiters, even where no penalty had been provided in the submission, was liable in an action for such damages as the other party could prove had been occasioned to him by this refusal. (*Voet*, 4, 8, 3.) That by the Dutch law, one party *invito altero* cannot remove the decision of the matters referred from the arbiters to the Judge ordinary. (*Voet*, 4, 8, 21; "*Sed. Geldris.*") And that the party in whose favour an award is given is entitled to apply to any competent Court, to issue its process, to cause the award to be executed by the party refusing to perform it. (*Voet*, 4, 8, 23; "*Jure tamen novo.*") And it is not even competent, when in the submission the right of reduction of the award is renounced, for the party dissatisfied with the award to revoke that renunciation. He can only apply to the competent Court to be restored against that renunciation, on cause shown, and only for certain causes. (*Voet*, 4, 8, §§ 26 and 24.) *A fortiori* it must be incompetent for one of the parties *invito altero* to revoke a submission like that in the present case, containing a clause that it shall not be revocable by either party.

The Court, in respect of the arguments adduced and the authorities referred to by the plaintiff, found that it is not competent for one of the parties to a submission to revoke and cancel it *invito altero*.

The defendant's Counsel further maintained that the award should be set aside on the ground that it had been made by the arbitrators without enforcing production of the original books and documents kept by plaintiff in London and referred to in his deed of revocation, notwithstanding that the defendant had applied to the arbitrators to cause the plaintiff to produce them. From the affidavits put in by both parties, some of which were made by the arbitrators, it appeared to the Court that the defendant had, before the arbitrators, alleged in defence against the plaintiff's claim for the balance asserted to be due by the defendant to him: that Twentyman had obtained from the sellers of the goods purchased by him for the firm, discounts on the invoices, but had, notwithstanding, charged the firm with the whole of the invoice, instead of giving credit to the firm for the discounts, as he was bound by the articles of agreement to have done. That the plaintiff had not given credit to the firm for the sums remitted by them to him at the times when the same were received by him, and had charged the firm with sums paid by him as having been paid at the date of the invoices, instead of at the dates when the payments were actually

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made, and had thus overcharged interest against the firm, and that the defendant had maintained that, without production of the books kept by the plaintiff in London, particularly his cash-book and bankers' book, he could not ascertain the items as to which the plaintiff had made those overcharges, or the exact amounts. That in the course of the submission it had been sworn by Mr. Croll, a witness called by the plaintiff, and whose evidence the arbitrators believed to be true, that he had kept the books of the plaintiff in London, that the account current between the plaintiff and the firm of L. Twentyman & Co., filed by the defendant in the submission had been made out by him from the plaintiff's London books before he left London, and that he and the senior clerk had compared it with the books by direction of plaintiff in order to be sure of its correctness, and that every item stated in it was correctly copied from the books. That when the defendant had called upon the plaintiff to produce the books and vouchers to prove the correctness of the items charged in the account current, the arbitrators had granted time to the plaintiff to procure them from London. That the London books were not produced, solely because they were in use and were necessary for purposes connected with the transactions in his business in London; but that the defendant was informed of this prior to his revocation of the act of submission, and that he and his agents might have free access to these books in London. And that the plaintiff had procured from London and produced to the arbitrators the original bills of parcels and receipts for the price of all the goods charged by him as having been purchased by him for the firm. That on the 22nd July, 1845, three days before he had revoked the submission, the arbitrators had distinctly stated to him—"When your statement (in answer to plaintiff's statement of his claim) is before us we shall be better enabled to judge whether the production of the books and papers which you have demanded, and which would occasion so much delay, would or would not have any effect on our minds, in determining the points submitted to our decision;"—and that the arbitrators had never formed or expressed any determination to proceed without the London books, until they had been put into possession of the original bills of parcels and receipts for the payment of the goods bought by the plaintiff for Twentyman & Co. That the defendant never filed his counter statement, and after he had executed the deed of revocation refused to attend any meeting of the arbitrators, although required to do so.

The defendant maintained that under these circumstances the arbitrators had improperly refused to enforce the pro-

duction of, and had consequently given their award without hearing, evidence which was necessary for the just decision of the case. And also that the clause in the deed of submission whereby the parties covenanted that they would when required attend the arbitrators for the purpose of producing such books, papers, &c., as may be in their respective possession or power touching the matters in difference, was a condition which gave the defendant an absolute right to require the production of the London books, whether the arbitrators deemed their production necessary or not; and that the failure of the plaintiff to perform, and of the arbitrators to enforce performance of, this condition was a sufficient ground in law to entitle the defendant to have the award set aside.

Ebden, for the plaintiff, argued *contra*, and quoted *Watson on Awards, p.* 100.

The Court decided that under the clause referred to in the deed of submission, the parties were only bound to produce such books, &c., as the arbitrators ordered to be produced. That although cases might occur in which the Court would set aside an award on the ground that the arbitrators had refused to receive competent and relevant evidence tendered to them by the party against whom the award was made, yet that the general rule was, that the arbitrators were the absolute judges of the competency and relevancy of the evidence tendered to and received or rejected by them. But that it was unnecessary to enter upon that question in this case because the original bills of parcels and receipts, the documents from which alone the books could have been correctly made up, were the best evidence of the matters to prove which the defendant had required the production of the books; and therefore that the arbitrators had done right in receiving them as evidence, in preference to the books which had been compiled from them.

The Counsel for the defendant further maintained that the defendant had, in his statement of his case submitted to the arbitrators, made a claim for remuneration for services rendered by him to the firm, and that as this was one of the matters referred,—and as the award made no mention of this claim, the award was null, as not having decided all the matters referred by the submission. And quoted *Voet*, 4, 8, 18.

But the Court held that, as this claim for services had been made in defence against, and in diminution of, the balance claimed by the plaintiff from the defendant, the following clauses in the award comprehended and had decided this question between the parties:—

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"And having read and considered the statements, and carefully examined the account book, vouchers, and documents produced in reference to the claims of the said L. Twentyman upon the said John Chisholm, alleged to be due by him upon a balance of account arising from partnership and individual transactions between the parties, &c., &c., &c.,—we do therefore accordingly find, award, order, adjudge, and determine, that the said John Chisholm is indebted to the said L. Twentyman in the sum of £7,168 13*s.*, &c., &c."

The defendant's Counsel further objected that the award was void on the face of it, for want of sufficient certainty and finality in regard to the matters which it professed to have decided, in respect of the following clause in the award :—

"And we do further find, award, &c., &c., in respect to the bad, doubtful, and disputed debts due to the firm of Twentyman & Co., of which a list is hereunto annexed marked A, that in case any sum or sums shall have been received by the said L. Twentyman subsequent to the 30th June, 1841, and omitted to be placed at the credit of the said accounts respectively, or which shall hereafter be received by him, he shall duly pay or otherwise allow, in diminution of the aforesaid sum of £7,168 13*s.*, one moiety of all such sums received and omitted, or to be received by him, as the proportion due to the said J. Chisholm in such partnership accounts." (*Vide* 7 *Term Reports, p.* 73 ; *Stephen's Nisi Prius*, 1 *vol., p.* 107.)

The plaintiff put in an affidavit by the arbitrators, in which they swore that Chisholm had stated to them that various sums had been received after the 30th June, 1841, by the new firm of Twentyman & Warner, on account of the outstanding debts mentioned in said list due to the former firm of Twentyman & Co., and which had been omitted to be placed to the credit of the partners enumerated in said list; and that the arbitrators repeatedly required Chisholm to point out the said omission or to give in a statement in writing of the particulars thereof, but that he had never done either. That it had been proved before them by the bookkeeper of Twentyman & Co., that as far as his knowledge went, no sums had been omitted to the credit of such accounts. That in consequence of Chisholm refusing to attend their meetings, or to give any information on the point at issue, and in order to avoid the possibility of any injustice being done to the said J. Chisholm, by debarring his right as a partner to a moiety of such sums if they could be proved to have been omitted, they had adjudicated thereon as set forth in the award. That in consequence of

his refusal to attend their meetings or to agree to a proposition that the outstanding debts should be taken over by one party or the other, they were compelled to make their award so as to give Chisholm the rights of such contingencies arising from the receipt of any payment which might hereafter be received from the debtors enumerated in the said list. And that they were of opinion that the real value of these outstanding claims at the present time would not be more than from £20 to £30.

The Court held that the award, in so far as respected such sums as might hereafter be received on account of the bad debts, contained a finding and decision as definite as the nature of the subject and the circumstances of the case admitted; and that this part of the award was not liable to any objection. That in so far as respected any sums which it was alleged had been received between the 30th June, 1841, and the date of the award, it was defective in so far as it referred for farther and future proof a matter which it was in their power, and which they ought to have decided in favour either of the plaintiff or defendant. But in respect of the arguments maintained and the authorities quoted by the defendant's Counsel (*Voet*, 4, 8, 26, and 31), the Court held that the defendant was barred from seeking to have the award set aside on this ground—by virtue of the clause in the deed of submission, by which the parties renounced all right of reduction, reformation, or appeal from the award to follow thereon,—until he should first have been restored by the Court upon good cause shown by him against such act of renunciation.

The Court also expressed an opinion that it was competent for the Court to sustain an award in part, and set it aside in part (see *Watson on Awards*, *p.* 190, and *Voet*, *pp.* 4, 8, 18); and that if they had been compelled to have set aside that part of the award which related to the sums alleged to have been received between the 30th June, 1841, and its date, they would have sustained the award *quoad ultra*.

Lastly, the defendant's Counsel, on the authority of *Voet*, 4, 8, 15, maintained that the award was null, and ought to be set aside, in respect that it had been made in the absence of the defendant.

The Court held that it was proved that the defendant had had due notice to attend, and that it was his own fault that he had not attended; and that even if, notwithstanding this, the award might have been objected to on account of his absence—as to which they expressed no opinion,—he was bound by the clause of renunciation from now seeking to set the award aside on that ground. (*Vide Voet*, 4, 8, 26, 31.)

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On these grounds, the Court confirmed the award; and ordered it to be made a rule of Court, with costs; and refused the cross motion to set aside the award with costs. (*Vide Knapp's Appeal Reports, vol.* 1, *p.* 100; *Jacobs and Walker's Chancery Reports, vol.* 1, *p.* 505; *Harcourt* vs. *Ramsbottom.*)

CHAPTER IV.—SECTION I.

SHIPPING.

MONTGOMERY *vs.* GREEN.

Ship case. Authority of ship-master over surgeon. Action by surgeon of a ship against the master for damages for improper treatment on board. Arrest of ship-master to found jurisdiction.

1833. June 13.

Montgomery vs. Green.

The declaration stated that the plaintiff had engaged with defendant, who was commander of the ship *Triumph*, to be the surgeon of the said vessel on the voyage from London to Bombay and back, at a salary of £5 per month. That the plaintiff accordingly sailed in the *Triumph*, and performed the duties required of him as surgeon of the ship.

That on the 24th May, 1832, on the voyage from Bombay to the Cape of Good Hope, the plaintiff being in the cuddy of the ship, where he lawfully might be, the defendant, without just cause or provocation, ordered the servants and seamen forcibly to put the plaintiff out of the cuddy, and that he then was, by defendant's order, forcibly dragged and pushed from the cuddy down to the plaintiff's cabin, and was there unlawfully imprisoned and confined for thirty-three days, until the ship arrived in Table Bay on the 26th June, during which time the plaintiff suffered greatly from want of air and exercise.

That on the 27th June, while the ship was in Table Bay, the defendant wrongfully threatened by force to put plaintiff out of the ship; and the plaintiff having come on shore for the purpose of obtaining advice, upon his going alongside the ship, was forcibly and unlawfully prevented by the officers, acting under the defendant's orders, from going on board the ship, and was thus left behind in this Colony against his will, and to the great loss and injury of the plaintiff.

That the defendant having again returned to this Colony in January last, the plaintiff caused a judicial arrest to

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be laid on the person of the defendant until he had given bail to abide the judgment of this Court and submit to the jurisdiction thereof. Whereupon plaintiff brings this action, and prays that the defendant be adjudged to pay to plaintiff £500 damages and costs.

In his plea, the defendant pleaded that he was not guilty of the matters laid to his charge in manner and form as in the declaration mentioned; and, for a further plea, stated that the plaintiff refused to obey the lawful orders of the defendant, as master of the ship, and did not remove himself from the cuddy when required by the defendant so to do; and that, with just cause, and as he lawfully might, the defendant caused the plaintiff to be put out of the cuddy, and, in so doing, did, or caused to be done, no unnecessary violence to the plaintiff. And that the plaintiff was, for the cause aforesaid, by order of the defendant, taken, with no unnecessary violence, from the cuddy, and ordered to his cabin, and was required to remain therein, excepting when the plaintiff was required to perform his duty as surgeon, and was permitted to take necessary exercise. And that the plaintiff was lawfully prevented, by the orders of defendant, from coming again on board the ship, for the cause aforesaid, and also by reason that when the plaintiff was required by the defendant to shut the scuttle of his cabin window for the safety of the ship, he, the plaintiff, refused to do so, and forcibly obstructed and resisted the persons who were ordered by the defendant to shut the same, whereby the safety of the ship was endangered.

At the trial, evidence was put in which had been taken *de bene esse* at the instance of the parties respectively. It proved the plaintiff's refusal to allow the scuttles of his cabin to be barred by the ship's joiner in bad weather, his use of bad language, his refusal to leave the cuddy table when desired by the captain, his being, in consequence, carried out of the cuddy, his use of improper language to the captain on deck, and his removal to his cabin, where he remained under arrest till the vessel's arrival in Table Bay, when he was dismissed.

MENZIES, J., held that the plaintiff, by his engagement, bound himself not only to obey the orders of the captain with reference to his medical duties, but all lawful orders given by the captain with reference to the internal arrangements and economy of the ship, and to conduct himself with subordination to his superior officers; and that any act of insubordination or disobedience, however small, was such a breach of his engagement on the part of the plaintiff as justified the defendant in putting an end to the engagement,

and dismissing him, if he chose so to do, at the first convenient opportunity, which the arrival of the ship in Table Bay a British port, was. He held that the refusal of the plaintiff to allow his scuttle to be shut was disobedience of a lawful order, aggravated by being persisted in to such an extent as to make it necessary to break open the door of the cabin; and by the abusive, unofficer-like, insubordinate and ungentlemanly language made use of by plaintiff to the first officer. And that this conduct on the part of the plaintiff justified the defendant in refusing to allow him to be in the cuddy,—consequently, that the order to leave the cuddy table was lawful, and that the plaintiff's refusal so to do was a disobedience of a lawful order, and was aggravated by being persisted in, so as to make it necessary to have to resort to force in order to enforce his removal from the cuddy; and by the abusive, unofficer-like, insubordinate, and ungentlemanly language made use of by plaintiff to defendant and first officer, and justified the defendant in ordering him to leave, and, on his disobeying the order, to remove him by force from the poop; that the force used in removing him from cuddy and poop amounted only to a lawful and *molliter impositio manûs*. That the disobedient, unofficer-like, and insubordinate conduct of the plaintiff made it the duty of the defendant to punish the plaintiff in order to preserve the discipline of the ship; and that confinement to his cabin, with permission to take two hours' exercise on deck, and to attend to the medical duties of the ship, was not an excessive punishment in kind, and might lawfully be continued, especially as plaintiff made no acknowledgment of his offence, or promise of amendment, until the defendant had an opportunity of removing plaintiff from the ship. That the keeping the scuttle caulked up was justified by the conduct of plaintiff in improperly keeping this scuttle open on at least twelve former occasions, when the state of the weather required the scuttles to be closed; otherwise he would have considered it as an unnecessary severity. He was, therefore, of opinion that judgment should be given for defendant with costs.

WYLDE, C.J., and KEKEWICH, J., were of a different opinion on all the above points, and gave judgment for plaintiff for £50, with costs.

DIXON *vs.* GRAINGER.

Master of ship's wages. Action to recover.

Reconventional claim by owners for master's neglect in receiving more cargo on board.

1842. May 10. — Dixon *vs.* Grainger.

This was an action for wages, brought by Captain Dixon, the master, against Captain Grainger, the owner, of the bark *Courier*. The sum claimed was £89 17*s.* 3*d.* The defendant pleaded that he did not owe more than £36 2*s.* 5*d.*, which he had tendered, with interest, and that therefore he was not liable for costs. As a further plea he alleged that his interest had not been properly taken care of by the plaintiff, through whose carelessness, neglect, and improper conduct he had sustained damage to the amount of £50; and set forth, as instances of such misconduct, the same facts set forth in the claim in reconvention. As a claim in reconvention, the defendant complained that the plaintiff had been employed by him as master of the *Courier*, at a salary of £10 per month; that the ship was then let on freight to one Jonathan Hearder for a certain voyage under a charter-party, wherein she was warranted capable of taking in and stowing at least 400 tons gross, over and above her tackle, apparel, and furniture; that the plaintiff was expressly enjoined by defendant to adhere strictly to the tenor and terms of the charter-party and the special instructions which were given him for the prosecution of his intending voyage; but that not regarding his duty, he did not take due and proper care of the interest of defendant, or properly attend to the injunction and special instructions which were then given him; but, on the contrary, did, during the prosecution of the said voyage, namely, to Lombock, refuse to take on board for the said Jonathan Hearder so large a quantity of goods and commodities as the ship had been warranted, under the terms of the charter-party, to be, and which she was actually capable of taking and stowing, and in other respects conducted himself with great carelessness, negligence, and inattention, by reason whereof the defendant had sustained damage to the amount of £50.

After hearing evidence, the Court gave judgment for plaintiff with costs, for £86 0*s.* 5*d.*, with interest from 27th March, 1841. The Court held that this cause resolved into the single question of whether the plaintiff had, as master of the ship *Courier*, committed an act of so improper a nature as to render him liable in damages to the defendant in reparation of the £50 loss which had been occasioned

1842. May 10. — Dixon vs. Grainger.

to him by that act. That as defendant, neither in his pleadings nor at the bar, had alleged that there had been any *mala fides* on the part of the plaintiff, the question was simply whether the plaintiff, in refusing to take on board the additional ten tons of rice to be stored in the cabins, had acted contrary to sound discretion. They held that as the *Courier* was only a ship of 263 register tonnage, as the average dead weight which ships in general carry in proportion to their register tonnage is one-third more, as he had on board 390 tons, all of dead weight, and as the hold, the proper storing place for the cargo, was completely filled with this dead weight, and that the charterer objected to his doing so, and considering the evidence which has been laid before the Court, he must be considered to have exercised a fair discretion in refusing to take in and stow in the cabins ten tons more dead weight, by which he would have exposed plaintiff to the risk of actions of damages at the instance of the charterer—first, for any loss which might have been sustained on the rice so stowed there; secondly, for the loss of his passage in the *Courier*, and the expenses of his passage in another vessel; and if the ship had been lost or damaged on the passage, might have given the underwriters on the ship a defence against any claim for the sum assured on the ship.

Prince *vs.* Robinson.

Stowage on ship-board: what is such sufficient stowage as founds no action for damages.

1840. Nov. 24. — Prince vs. Robinson.

In this case, the plaintiff sued the defendant, master of the brig *John Scott*, for £100, as damages sustained by the plaintiff by reason of the non-delivery by defendant of certain pieces of machinery, and the breakage and injury, by rust and corrosion, of certain other pieces of machinery, all which pieces, as well those broken and otherwise damaged as those lost, were so broken, damaged, and lost in consequence of the improper stowage thereof on board the said brig by the defendant or his servants.

The bill of lading, signed by defendant, admitted the receipt of twelve packages of machinery, "weight and contents unknown to me, and not accountable for breakage."

It was proved that the machinery was that of a large iron turning-lathe, consisting of iron machinery, both rough and polished; that it had been packed by the shipper,

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and delivered on board not in cases, but only wrapped round with very coarse loose matting, secured with twine and rope yarns, and some of them having straw. It was admitted that it had been stowed in the lower part of the hold among coals, *i.e.*, having coals stowed both below and above. On landing, the matting was found to be rotten and decayed in many places, as if from coal damp, and the polished part of the machinery considerably injured by rust and corrosion from damp.

There was no proof that those parts (which were not many), which were broken, might not have been broken in their conveyance to the ship in England, much less that they had been broken by any improper or negligent conduct of defendant. There was no reason to believe that the few small pieces which were missing (even if not lost in the conveyance to the ship in England) might not have, and had not, been lost in the conveyance from the ship to the store in Cape Town, in consequence of the careless manner in which it had been originally packed and the defective state of the matting.

The result of the evidence of engineers, ship-masters, and stevedores (persons employed to stow ships), called by both parties, was that stowage of machinery, properly packed according to its quality, among coals in the lower part of the hold, was good and judicious stowage; that iron machinery, for which mere matting was a proper packing, would sustain no injury from such stowage; that polished iron machinery, such as in this case had been injured, was improperly and insufficiently, and ought not to have been packed in matting, but first wrapped round with hay bands, and then inclosed in cases; consequently, that defendant was entitled, from the manner in which the injured machinery had been packed, to believe that it was machinery which would not be injured by being stowed as this had been.

In consequence of this evidence, the Court gave judgment for defendant, with costs.

BROWN *vs.* CHIAPPINI.

Shipping. Working days. Demurrage. Charter-party.

Working days in a charter-party construed to include every day, except Sundays and holidays, whether the weather may have admitted of work being done or not.

1838.
May 7.

Brown et.
Chiappini.

By a written agreement, executed by the plaintiff and defendant, the brig *Test* was chartered by the plaintiff to the defendant to bring a cargo from Plettenberg's Bay to Table Bay, which agreement, *inter alia*, contained the following condition:—

"That on the arrival of the brig at Plettenberg's Bay, and being reported with twenty-four hours' notice as ready to receive cargo, the plaintiffs, or their agents, will cause such timber as may be required for a full and complete cargo to be transported to the water's edge, as fast as the same can be received by the crew of the said brig, within the period of thirty-five working days, and that the plaintiffs shall pay for demurrage, if any shall be by default of them or their factors, £4 per day, daily and every day as the same shall become due."

The plaintiff's declaration set forth the charter-party containing the above conditions; that the brig arrived at Plettenberg's Bay on the 3rd August; that on the 11th August the plaintiff gave notice to the defendant's agents there that he was ready to receive cargo, and on the same day proceeded to take in cargo, and remained so doing in Plettenberg's Bay until the 22nd October following, when he sailed for Table Bay, arrived there and delivered the cargo.

That reckoning from the 11th August, when the plaintiff commenced taking in cargo, the period of thirty-five working days expired on the 19th September, and the working days between the 19th September and 22nd October were twenty-two.

That it was by default of defendants and their agents that the cargo was not put on board sooner, and that he is therefore entitled to claim from the defendants the sum of £4 for each of the said last-mentioned twenty-two working days, amonnting in the whole to £88.

The defendants pleaded the general issue.

At the trial, after hearing the witnesses for both parties, the Court found it proved that the brig arrived at Plettenberg's Bay on the 3rd August; that notice of her being ready to receive cargo was given to the defendant's agents, and that she commenced receiving cargo on the 11th August.

The Court were of opinion that the words "working days" in this charter-party must be construed to mean every day, except Sundays and holidays, whether the weather may have admitted of work being done or not. (*Vide Nott on Shipping, vol.* 2, *pages* 13, 30; *Lawes on Charter-parties, p.* 131; *Abbot on Shipping, page* 180.)

2ndly. That the stipulated period of thirty-five working

1835. May 7.

Brown vs. Chiappini.

days expired on the 18th September, and that, by the default of the defendants, and by no fault of the plaintiff, the loading of the cargo was not then completed, and was not completed until the 21st October, and that demurrage was due from and after the 18th September exclusive, until the 21st October, inclusive. 3rdly. That the stipulation that £4 should be paid per day, daily and every day for demurrage, entitles the plaintiff to demurrage for every day, including Sundays and holidays, after the demurrage commenced; and although during some of those days, in consequence of accidents to the ship (*e.g.*, being driven from her anchors, loss of boats, &c.) the crew could not have taken in cargo. But as the plaintiff has limited his demand, in his declaration, to demurrage for twenty-two working days, the Court can give him no more. That, to make demurrage commence, nothing is required except the expiration of the stipulated period. No notice is required from the master or shipowner.

The Court therefore gave judgment for plaintiff for £88, and costs.

In re "Justitia."—Norden *vs.* Clarke.

Ship arrest, to found jurisdiction.

1846. Nov. 17.

In re Justitia.— Norden vs. Clarke.

In this case, *Brand*, for Mr. Benjamin Norden, put in an affidavit made by Norden, stating that he had acted as agent for the schooner *Justitia*, now lying in Table Bay, for two years up to the present time, and that there is now owing to him by Joseph Clarke, now or lately of Plymouth, in England, owner of the said vessel, £274 7*s.* 10*d.*, being the balance of an account stated between the deponent and Clarke, as owner of the said vessel, for moneys paid and expended for certain necessary and indispensable repairs effected upon the said vessel during the period deponent acted as such agent, and for supplies furnished to, and other disbursements made by him for and on account of the said vessel whilst acting as such agent. And that deponent had applied to the master of the said vessel for payment of the said amount, who had informed the deponent that he is unable, and has no means whatever to satisfy the same. That the deponent has no mortgage, pledge or security for the said amount, save such claim as he may have by law upon the said vessel, and the freight earned by her upon her last voyage. That R. Solomon,

of Cape Town, who hath represented himself as the agent of the assignees of the said owner of the said vessel, has claimed delivery of the same, and has stated that he intends to sell the same without delay; but that the said Solomon, either as such agent or otherwise, has refused to satisfy the said claim, or any part thereof, although deponent hath made repeated applications to him for that purpose.

And in respect of the facts stated in the above affidavit, *Brand* now moved for a writ to arrest the said vessel *jurisdictionis fundandæ causâ* in an action to be brought by him for the purpose of constituting his said debt against the said Clarke, or the said agent of his assignees as the case may be, and making effectual the tacit hypothec which he maintained he had over the vessel and her freight, in respect of his said advances.

The *Attorney-General*, for Solomon, as agent of the assignees, appeared to oppose the motion. He quoted *Henry on Foreign Law, pp.* 124, 133; *Burge on Colonial Law, 3rd vol., p.* 904; *Voet*, 20, 4, §§ 12 *and* 38; 2, 4, § 58; 5, 1, § 90; 11, 2, § 6; and *Story's Conflict of Laws*, § 40, 3, *page* 336; and maintained that, having been rendered a bankrupt in England, and his estate assigned to assignees under the English Bankrupt Statute, that assignation completely divested Clarke, and invested his assignees with the whole of his movable estate, wherever situated. Consequently, that the property of the said vessel was now legally vested in those assignees, from whom Norden was bound to claim the debt alleged to be due to him, by endeavouring to prove his debt under the commission in England; and if any question should be raised as to the validity of his claim, to litigate that question with the assignees in their proper *forum*, namely, the courts of law in England. And consequently, that if he brought an action in this Court,—even to constitute his debt, without insisting on process of execution being issued against any property of Clarke's which might be in this Colony,—this Court would, from that comity now recognized in the law of so many different nations, at once dismiss it, and refer the plaintiff to make good his claim against the assignees in England; and therefore that the Court ought not to issue a writ of arrest to enable the plaintiff to bring an action which would be certainly dismissed. He admitted that if, prior to Clarke's bankruptcy, Norden had acquired a hypothec affecting the vessel, he was entitled to make that hypothec effectual by an action brought in this Court; but stated he was instructed to deny that such a hypothec had been acquired. After some argument, he admitted

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that the question as to the hypothec was one more proper to be tried in an action than on a motion.

On this ground, and in order to save expense, the parties, before any opinion had been expressed by the Court on any of the points argued, agreed that the vessel should be sold, and the price and the freight earned by her on her last voyage, and still unpaid, should be paid into Court, to abide the decision of the Court in an action to be brought by Norden. (*Vide inter eosdem*, 11*th February*, 1847, *vol.* 2, *part* 3, *pp.* 376–7.)

SECTION II.

INSURANCE, MARINE.

CHIAPPINI & CO. *vs.* JONES.

Seaworthiness of ship: onus probandi of.

The plaintiff having given prime facia evidence of vessel's seaworthiness, which evidence was uncontradicted for the defence, presumption of law is in favour of vessel's seaworthiness.

Protest for non-payment to English owners, and production of bill, sufficient proof of its non-payment to found suit on the bill here.

Abandonment of vessel: when and by whom incompetent.

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The ship *Hall*, in the course of her voyage from the East to England, put into Simon's Bay for repairs, the money expended on which, being £1,022 18*s.* 4*d.*, was advanced by the plaintiffs, in whose favour the master drew a bill for that sum on Messrs. Charles Lawrence & Son, the owners of the vessel. The plaintiffs, through the medium of a broker, effected an insurance of the vessel for £1,000. This policy, in addition to the usual stipulations, contained a clause whereby "the said ship, &c., &c., for so much as concerned the assured, by agreement between the assured and assurer in the said policy, are valued at £1,000." And by a memorandum thereunto written, "it was declared that the said insurance is on the block of the said vessel, and that the condition of the policy is that, if the said vessel should be lost, but the bill drawn by the master on the owners for £1,000, or thereabouts, for her repairs, should, notwithstanding be paid in due course, then the underwriters are not to be liable. The ship declared to be free of average, both general and particular. Production of

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the bill to be proof of interest." The policy also acknowledged the payment of the premium at 2½ guineas per cent. The voyage for which the insurance was effected was from Simon's Bay to Liverpool, with liberty for the said ship in the said voyage to proceed to, and touch and stay at, any port or place whatsoever, without prejudice to the said insurance.

The defendant had underwritten this policy for the sum of £200.

This action was brought by the plaintiff to recover from the defendant the said sum of £200.

The declaration, after setting forth the policy, and the payment to the defendant of the stipulated premium of £4 14*s.* 6*d.*, alleged that on the 27th July, 1834, the said ship sailed from Simon's Bay, on her said voyage to Liverpool, and that in the course thereof, between the 1st and 16th August, 1834, the said ship by strong winds and tempestuous weather, became leaky and damaged, insomuch that it thereby became necessary for her to proceed to the island of Ascension, which was then the nearest port, where she arrived on the 19th August, and where it was ascertained that she had sprung a leak between the garboard streak and the keel, that the butt end of the garboard streak had started from the floor timbers, and that she could not be made seaworthy for a passage to England, or any intermediate port, without heaving the vessel down, keel out; that there was no means at Ascension for effecting the necessary repairs; and that she was, at Ascension on the 28th August, condemned as unseaworthy, whereby the said ship was wholly lost to the plaintiffs, and never did arrive at Liverpool.

That the said bill for £1,022 18*s.* 4*d.*, drawn by the master of the said ship on the owners, was duly presented for payment, and payment refused, and the same duly protested for non-payment, and returned to the plaintiffs, of all which the defendant had notice on the 12th March, 1835; but, although requested to pay the said sum of £200, has refused to do so.

The defendant pleaded the general issue.

At the trial, the plaintiffs put in the policy, the defendant's signature to which was admitted, and put in and proved the bill drawn by the master on the owners, mentioned in the declaration, and tendered, in proof of the non-payment thereof, a notarial protest.

Brand, for the defendant, objected that the protest could not be received in evidence, without proof being first given of the appointment of the notary by whom it bore to have been made, and also of the verity of his signature.

The Court overruled the objection. (*Vide Chitty on Bills, Ed.* 1833, *p.* 361; *Phillips on Evidence, vol.* 1, *p.* 36.)

The protest was then put in and read. It was as follows: —

"On this 22nd day of November, 1834, I, John Topham, notary public, duly admitted and sworn, &c., at the request of the holders, did exhibit the original bill of exchange (whereof a true copy is on the other side written) unto Mr. George Lawrence, of the firm of Messrs. Charles Lawrence & Son, the persons on whom the same is drawn, and demanded payment thereof (thirty days, and also the usual days of grace, having elapsed since the presentation thereof by me for acceptance), who answered that the same would not be paid because, on account of the loss of the ship *Hall*, its amount is to be recovered from the underwriters on a policy which Messrs. Chiappini & Co. have informed them they have effected at the Cape of Good Hope expressly to protect it. Wherefore," &c.

The plaintiffs then put in the evidence of R. Gillon and R. Garnett, the mates, and of J. W. Hughes, the master of the said vessel, all of which had been taken under a commission for that purpose, issued by the Court. The substance of the evidence of the master was, that the ship sailed from Simon's Bay on the 22nd July, and next day experienced strong gales, with a heavy sea, which caused her to pitch and strain; but she only made an inch of water per hour. That it blew strong for several successive days, and on the 9th August she was found to make two and a half inches per hour; on the 14th, three and a half inches, being then one hundred and fifty miles to leeward of St. Helena; that the leak continued to increase rapidly, and on the 19th August she made thirteen inches per hour, when he made for Ascension, where, on her arrival, the ship was surveyed by the master, the carpenter, and the carpenter's mate of H.M.S. *Isis*, and the master and the carpenter of the brig *Mela*. That the cargo was shifted with the view of discovering the leak, which was found to be between the garboard streak and the keel, a little abaft the mizen-mast, the butt end of the garboard streak having started from the floor timbers, at which time the ship was making twenty inches an hour. That attempts were made to stop the leak, but without effect. Whereupon the surveyors condemned the ship, and reported she could not be made seaworthy without being hove down, keel out. That there were no means at Ascension of making the repairs necessary to make her seaworthy from thence to Liverpool or any intermediate port. That, in his opinion, the said

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accident was occasioned by the rolling and straining of the ship after she left Simon's Bay, and had no connection with her previous leaks which occasioned her to put into that port, where, in his opinion, she had been thoroughly repaired, and was perfectly tight and staunch when she left it. That, in consequence of the report of the surveyors, he caused the cargo to be removed, and the ship to be dismantled and abandoned, and she was subsequently hauled on shore, and broken up by order of the Captain Commandant.

Gillon, the chief mate, corroborated the master's evidence generally, and stated that, after passing St. Helena, the ship sprung a leak. That after leaving Simon's Bay they generally had light winds, with squalls, and sometimes a cross sea, which caused her to labour a little; and he thought that this occasioned the leak; that he knew no other cause for the leak, but cannot undertake to say that the wind and the sea were sufficient to account for it. That at Ascension, while discharging, the leak was discovered, and that a butt in the garboard streak had started right square with the slip of the mizen-mast.

Garnett, the second mate, also corroborated the master's vidence, and stated that, after the ship had passed St. Helena, and was half way to Ascension, she sprung a leak, and made so much water that the pumps were kept constantly at work until they reached Ascension, which was about two days after they had discovered the leak. That the day after leaving Simon's Bay they encountered a strong breeze and a heavy cross sea. That, from the time the leak was discovered, the weather was squally, and a cross and heavy sea running, which caused the ship to labour and roll; and that, in his opinion, the leak was occasioned by the rolling and straining of the ship. That when the cargo was shifted, in order to discover the leak, it was found that a butt had started in the garboard streak, about two feet abaft the slip of the mizen-mast.

The plaintiffs then called Thomas Briggs Wool's, who stated:—I am Harbour-master at Simon's Bay. I made, along with J. Greggs, master carpenter, and Maggs, boatswain of the Dockyard, who is since dead, three surveys on the ship *Hall*, at Simon's Bay, on the 29th May, 4th June, and finally on the 18th July, 1834. At each of those surveys I took down in writing the state in which I found the ship. I now produce those three written statements of what we observed on those surveys. (The statements were put in and read. The third, which was entitled "Final Survey," declared the ship to be seaworthy at the time it was made.) At the time of the last survey, the ship was not making more water than is customary in every ship.

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Whatever leaks she may have had previously must then have been all stopped. We did not examine the garboard streak, which is that next the keel. We did not examine her below the water-mark after she had been lightened, because she did not then leak. I considered the ship *Hall*, to the best of my knowledge and belief, to have been seaworthy, staunch, strong, and fit for the voyage to Liverpool, when she sailed from Simon's Bay. The *Hall* was between four and five hundred tons burden. She was thirteen or fourteen years old, but she had had an extensive repair a few years before, so that she was, when at Simon's Bay, not in that state which otherwise a ship at fourteen years old would have been. The parts which had not been repaired was perfectly sound. I think the *Hall's* cargo was principally sugar. She had not near a full cargo. The south-east trade wind blows between this and St. Helena constantly, and in July and August commences about S. lat. 27. It is very usual for a vessel sailing before a trade wind to have a following sea. A ship going before the trade wind is apt to roll very much, and, if loaded deeply, she will roll the more heavily. Such rolling is likely to occasion injury to the vessel. Straining and working in various parts of the hull is very likely to start planks, particularly in ships of a certain age. I think it perfectly possible that a vessel which was seaworthy when she sailed from Simon's Bay might have leaked in the way the *Hall* did, after a voyage from Simon's Bay of such a nature as that described in the master's evidence. I cannot account for her leaking after such weather as described by the first mate, in any other way than he does. I concur with the opinion of the second mate, under the circumstances which he describes. It is not usual, but possible, for a leak to be occasioned in a stout vessel during such a voyage as she is described to have had. I should not have expected her to have leaked an inch in an hour so soon after her sailing, but I should not have considered it material. I do not think it safe to keep the sea with a vessel making thirteen and a half inches an hour under the circumstances respecting the ship's leaking described by the master and mates; and if I could not have discovered the cause of the leak, I should have made for the nearest port. When to leeward of St. Helena, Ascension was by much the nearest port. I do not think going to Ascension, in a voyage from Simon's Bay to Liverpool, any deviation at all; it lies in the direct course.

James Griggs, who stated that he had been a ship carpenter thirty-five years, and in the Naval Yard at Simon's Bay

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twenty-three years, concurred with the preceding witness in every respect, and added: —When the cargo was taken out, we found that the previous leak was in the streak, under the wales, which had been under the water-mark when the cargo was in. I considered the ship, at the last survey, to be tight, staunch, strong, and seaworthy. I saw nothing about the *Hall* to make me think she was less seaworthy than any ship I ever saw. It was impossible that there could have been anything wrong with the garboard plank, or with the plank next the garboard streak, at the time of the last survey. I think the surveyors at Ascension must have mistaken the plank next the garboard streak for the garboard streak plank, as they could not see the garboard plank unless the keel was hove out of the water. Sugar is a dead weight, and makes a ship roll very much, particularly before a trade wind. A very heavy sea runs off Cape Point in July, occasioned by the south-west wind. I was in the *Volage*, man-of-war, in 1817, when between Simon's Bay and Ascension, and without there having been a gale, and in a consequence of rolling, she started a butt amidships, on the eighth streak from the keel. We were enabled to stop it. The *Volage* was about fifteen years old.

John Barker:—I am the plaintiffs' attorney. On the 21st March, 1835, I applied to defendant for the amount he had underwritten on the *Hall*, and told him the plaintiffs were ready to assign to him all their interest in the bill drawn by the master on the owners, or to lend their names, or to give him any other facility he might suggest, to enable him to receive the amount from the owners. I think his reply was that the owners were bound to pay the bill, and he had nothing to do with it.

The plaintiffs closed their case.

The defendant called—

James Bance:—I am a lieutenant in the Royal Navy, and Port-Captain of Table Bay. I do not think that the weather, as described by the first and second mates, ought to have made a ship, which was seaworthy, staunch, and strong when she left Simon's Bay, leak as the *Hall* did; but, although this was not to have been expected, it is possible that it might have done so. I don't think that a ship which had strained so much in her upper works as the Simon's Bay surveys describe the *Hall* to have done could have done so without having strained her underworks to some extent also. The garboard streak is the most unlikely to start of any streak. It was impossible for the surveyors at Ascension, unless the ceiling was ripped off and the kelson laid bare, to discover whether the leak arose

from the garboard streak or the plank next it having started, or to have seen that the butt of the garboard had started, although it had actually done so. But they might have come to that conclusion from seeing the water rush up. Butt ends do sometimes start without any assignable cause. I think there must have been some latent defect, before the vessel sailed from Simon's Bay, in the plank the butt of which started. But I am not prepared to say that this must have been the case.

The defendant closed his case.

The *Attorney-General*, for the plaintiffs, maintained that the ship was proved to have been seaworthy when she sailed, and to have received the injury which occasioned her loss in the course of her voyage between Simon's Bay and Ascension: and contended that the *onus probandi* that the ship had been unseaworthy lay on the defendant; and quoted *Marshall on Insurance, Ed.* 1823, *Vol.* 1, *p.* 151. He maintained that the offer of the plaintiffs to assign the bill to the defendant was a sufficient abandonment.

Musgrave maintained,—1st. That the evidence proved the ship to have been unseaworthy; and that, even if the evidence did not go this length, the *onus probandi* lay on plaintiffs to prove that she was seaworthy; and that they had not done so; and quoted *Park on Insurance, Ed.* 6, *p.* 160.

The Court held that the plaintiffs had given *primâ facie* evidence of the seaworthiness, which was not contradicted by any evidence whatever; and that, therefore, the presumption of law was that she was seaworthy. (*Vide Park, c.* 11, *p.* 333, *and notes.*)

MENZIES, J., stated his opinion to be that, even if the particulars of the survey held at Ascension could not be held to have been proven by the evidence of the master and the two mates, on the ground that they had not been sufficiently proved to have been present at the survey, yet that the facts that a survey had taken place, that the surveyors reported the ship to be unseaworthy, and that she could not be made seaworthy without being hove down, had been legally proved by their evidence. And that it was not necessary for the plaintiffs to prove in what part of the ship the leak was, nor with *primâ facie* evidence of seaworthiness, uncontradicted by any contrary evidence, was it necessary to prove how it had been caused. That in this case, therefore, it was sufficient for the plaintiffs to prove, as they had done, by the evidence of the master and mates, that the ship sprung a leak at sea, of such an extent as rendered her unfit to keep the sea, and made it necessary for her to put into Ascension. That she could not be

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repaired there so as to make her seaworthy; and that, in consequence thereof, she was dismantled and broken up.

Musgrave next maintained that a protest for non-payment was not sufficient to prove that the bill had not been paid in due course.

The Court held the protest, with the production of the bill, sufficient proof that the bill had not been paid in due course, in a question between the present parties.

Musgrave next contended that a formal abandonment was necessary to entitle the plaintiffs to sue, and that no such abandonment was here made, and quoted *Van der Linden, Inst., p.* 656, and maintained that the plaintiff was bound to have abandoned the ship to the underwriters.

The Court held that Chiappini & Co. had no right in or to the ship which they could abandon, or by virtue of which they could abandon the ship to the underwriters. That from the whole tenor of the policy, it was clear that the thing insured was the interest to the value of £1,000 in the bill drawn in their favour, for the repairs of the ship, by the captain on the owners, the ability of the owners to pay which, or of the plaintiffs to recover payment from the owners of which, was dependent on the safe arrival of the ship; and held that the offer of the plaintiffs to cede to defendant all their interest in the bill, and to do everything which could facilitate his receiving payment of the bill, was a sufficient abandonment.

Postea (27th February, 1837).—The Court gave judgment for plaintiffs, with interest *a tempore moræ* (being the 21st March, 1835, when the demand was made on defendant) and costs. And this, notwithstanding it was maintained that the defendant ought not to be condemned either in interest or costs, because he had *probabilis causa litigandi.*

SMITH *vs.* SKINNER, ASSISTANT COMMISSARY-GENERAL.

Charter-party, construction of. Demurrage. Pleading. Prayer for general relief, effect of. Waiver, on pleadings, by defendant of non-jurisdiction of Court.

In an action for freight, on a charter-party, it is necessary for the plaintiff to prove that he has fulfilled all the conditions therein obligatory upon him, or that he has been prevented by the charterer from so doing.

Where in an action for specific performance of a contract

of charter, the declaration also contains a prayer for general relief, such prayer only entitles the plaintiff to claim under it such other relief as he can competently claim in an action of that particular form; he cannot, e.g., claim remuneration for work and labour done, nor damages for the vessel's detention.

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Smith vs. Skinner, Assistant Commissary-General.

The plaintiff's declaration set forth that the defendant, in his capacity as a Deputy Assistant Commissary-General in Her Majesty's Commissariat Department, was summoned to answer the plaintiff in an action upon a certain charter-party, or agreement, as therein mentioned. That on the 17th July, 1846, and at Port Elizabeth, by a certain charter-party of affreightment, or agreement, made between the defendant in his capacity of the one part, and the said plaintiff of the other part, it was mutually agreed as follows:—

"That the plaintiff should provide a vessel, viz., the brig *William Woolley*, Capt. Virtue, to carry stores to the Buffalo River mouth, and there land the same, if landing be practicable; also to provide men to work the boats, the master and his crew using all and every means to effect the same. The Commissariat agree and engage to ship on board the said vessel stores to the extent of the vessel's capacity, not exceeding in quantity 200 tons; and also to put on board the vessel, with the stores, a surf-boat, or other boat, to land the said stores, with the necessary warps, lines, &c., &c., and to furnish a working or fatigue party to take the stores out of the said boats when they reach the landing place; and further, when the men working the said boats are on shore, to provide them with the usual rations of food; and for the stores so shipped to pay freight at the rate of £5 5s. per ton. And it is further agreed that in the event of the cargo not being landed from any difficulty arising in effecting the same, that no charge shall be made for the return freight, or bringing back the stores so shipped; but that the stores so brought back shall be taken from alongside the vessel, at the expense of the Commissariat, so soon as the vessel is in a situation to discharge the same; and the freight from this to Buffalo River only will be in such case considered as earned and payable. And if it be impracticable to land the said stores, the said vessel shall not be required to wait or lie at the aforesaid port or place of discharge longer than the term for the same, viz., thirty days, and if detained at the request of the officer or other person there appointed to receive the said stores, or from any cause not originating with the master of the said vessel, or if landing be delayed at any time from a point of expediency for the public service, demurrage shall be paid to J. O.

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Smith (the plaintiff) for the detention of the vessel as aforesaid, at the rate £15 *per diem*. The port or place is to be pointed out by a white flag being hoisted during the day, and two fires at night, which the Commissariat engage to have done; and should the place be found unfit for a vessel to lie at anchor by reason of the vessel losing her anchor and cable, the vessel shall be at liberty to return to Algoa Bay, as though the landing had been impracticable. The payment to be made in Treasury bills at par. This agreement to be subject to the usual exceptions of a bill of lading or charter-party, viz., fire, the dangers of the seas, the Queen's enemies, and the act of God. Port Elizabeth, 17th July, 1846. Given in duplicate under our hands and seals, at Port Elizabeth, the day and year above written.

"GEORGE A. SKINNER, D.A.C.G.
"JOHN OWEN SMITH.

"Witnesses { R. HARE,
H. C. CALDECOTT.

"I guarantee the vessel having Marryatt's signals on board.

"JOHN OWEN SMITH."

That afterwards on the 21st July, 1846, it was mutually agreed between the said defendant, in his said capacity, and the said plaintiff, that the destination of the said brig should be changed from the mouth of the Buffalo River to Waterloo Bay.

That on or about the 1st August, 1846, the said J. Virtue took in and received on board the said vessel a full and complete cargo of goods, according to the tenor and terms of the said charter-party, the particulars of which cargo are described in a memorandum marked A, thereunto annexed (viz., stores, charged £1,158 7*s*. 5*d*. = 220¾ tons at the rate of £5 5*s*. per ton, and a surf-boat and her appurtenances, charged £265 13*s*. = 50¾ tons at said rate.

That on the 2nd of August, 1846, the said vessel, being properly found with the necessary tackle, and well manned and provided, sailed, and on the 3rd of August arrived and anchored at Waterloo Bay; and on the following morning landed the surf-boat which had been shipped on board the said vessel by the said defendant, in his capacity aforesaid, with the appurtenances to the said boat belonging. That the vessel remained at anchor at Waterloo Bay, ready and prepared to discharge cargo, according to the terms of the said charter-party; and the said J. Virtue gave due notice

of his being so ready and prepared, to one Broxholm, who was the Commissariat officer in charge for and on behalf of the Commissariat department, and also did all that was required and necessary on his part to facilitate the landing of the said cargo until the 9th day of the same month of August, when he was compelled by stress of weather, and by reason of damage done to his windlass, for the safety of the vessel, to stand out to sea and return for repairs to Algoa Bay, where he arrived on the 11th August, and, after having completed his repairs, sailed on the 17th, and arrived at Waterloo Bay on the 18th August, when he again gave notice to the said officer in charge that he was ready and prepared to discharge cargo, and did all that was requisite and necessary on his part until the 28th August, when he lost an anchor and cable by stress of weather, and was obliged, for the safety of the vessel, to put to sea and to return to Algoa Bay; and, having procured another anchor and cable, he on the 12th September sailed for and arrived at Waterloo Bay on the 15th September, and again gave notice to the officer in charge that he was ready and prepared to discharge cargo; and further, on the 18th September, sent a written notice to the said officer that the lay days stipulated in the charter-party had expired, and that the vessel was in demurrage. That he remained at Waterloo Bay until the 19th September, when, having again lost an anchor, he was compelled, for the safety of the vessel, to return to Algoa Bay, where he arrived on the 22nd September, and, having procured an anchor, he sailed on the 29th September for and arrived at Waterloo Bay on the 1st October. when, in letting go the anchor, it parted and was lost. That the said J. Virtue, having signalized his loss to the shore, stood off and on, waiting to see whether an opportunity of discharging his cargo would occur, until the 3rd October, when, in accordance with instructions signalized to him from the said officer in charge, to act according to his own judgment, he returned to Algoa Bay for another anchor, where he arrived on the 5th October, and having there procured another anchor, he, on the 14th October, sailed for, and on the 16th October arrived at, Waterloo Bay, where he anchored on the 17th October. That he again gave due notice to the said officer in charge that he was ready and prepared to discharge cargo, and remained at Waterloo Bay, either at anchor or standing off and on, as he was by the said officer in charge ordered to do, until the 18th of October, when having been compelled to slip from his anchor for the safety of the vessel, and having been again signalized from shore to act according to his own judgment, he returned to and arrived at Algoa Bay on the 21st October.

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That during all these several occasions, and while the said vessel was at Waterloo Bay as aforesaid, although the said J. Virtue was at all favourable times ready and prepared to discharge the cargo of the said vessel, and give all the assistance in his power to that effect, and also gave due notice thereof, and although the plaintiff has at all times since the making of the said charter-party well and truly performed, fulfilled, and kept all things in the said charter-party contained to be performed and fulfilled on his part, yet the said defendant in his said capacity did not, nor did any one on his behalf, fulfil and perform all things to be performed and fulfilled on his part, and did not exercise due diligence, nor make sufficient and necessary preparation and exertion on his part required for the discharge and landing of the said vessel.

That the said vessel having thus lost four anchors and cables, and sustained other material damage, and having been employed in unsuccessful attempts to land the cargo for more than thirty days (viz., from the 3rd August to the 18th October, both inclusive), and the said defendant in his said capacity having failed to perform all that was required of him to aid in effecting the discharge of the said cargo, the plaintiff, on the 23rd October, when the said vessel was at anchor in Algoa Bay, gave a written notice to one Robert Hare, the officer there in charge of and acting for the Commissariat Department at Port Elizabeth, to commence the discharge of the cargo then on board the said vessel, according to the terms of the aforesaid charter-party, as speedily as might be, to avoid the future expense of demurrage, and that the said J. Virtue was ready and prepared to deliver the same. That the said vessel remained at anchor in Algoa Bay ready and waiting to be so discharged of her cargo from the 23rd October, but was not finally so discharged by the defendant till the 12th December, 1846. That if proper and due diligence had been used by the defendant or any one on behalf of the Commissariat Department, the cargo might have been taken from alongside and the vessel discharged in Port Elizabeth in a much shorter period; and therefore the plaintiff's claim for demurrage has been necessarily increased by the delay occasioned by the neglect of the defendant in his said capacity.

That the sum of £1,424 5*s.* became and was, and still is, due and payable from the defendant in his said capacity to the plaintiff for freight for the said cargo duly earned according to the form and effect of the said charter-party, which sum the defendant in his said capacity has refused to pay, although often requested so to do. That another sum of £1,515 hath become due and payable for demurrage for one hundred and

one days, from the 3rd September to the 12th October, 1846, at the rate of £15 *per diem*, according to the tenor and effect of the said charter-party, which sum the defendant has refused to pay, although requested so to do. Wherefore the plaintiff prays that the defendant in his said capacity may be condemned by the judgment of this honourable Court to pay the said plaintiff the several sums of £1,424 5*s*. and £1,515, together amounting to the sum of £2,939 5*s*., with interest *a tempora moræ*, and exchange, together with the costs of suit; or otherwise that the Court may give such relief in the premises as may seem meet.

The defendant pleaded the general issue. But subsequently and before the trial, on the 2nd December, 1847, the *Attorney-General*, for the defendant, entered on the record a minute wherein "he waived and renounced the right of the defendant, if any such there were, to dispute the jurisdiction of the Court, and he submitted himself to the judgment of the Court in the premises."

After considering the evidence taken *de bene esse* and given at the trial, and the respective admissions of the parties, the Court held the following to be the result:—

That the plaintiff had chartered the brig *Wm. Woolley* from her owners, at the rate of £200 per month, and a certain share of the profits which the plaintiff might make of the vessel. That the plaintiff had chartered this vessel to the defendant for the use of the Commissariat Department, by the charter-party mutually executed by them, the provisions of which were correctly set forth in the declaration.

On the 21st July, the plaintiff and defendant mutually agreed that the vessel's place of destination should be changed from the mouth of the Buffalo to Waterloo Bay.

About the 1st of August, 1846, the Commissariat Department put on board the vessel the cargo specified in the memorandum annexed to the declaration, and also a surf-boat, with surf-lines, warps, blocks, two anchors to be used for mooring the lines in the sea, and other articles necessary for working such a boat. For the cargo and the surf-boat and its appurtenances, two several bills of lading were given to the Commissariat by Virtue, the master of the vessel, in each of which was inserted the following clause: "To be taken from alongside as agreed, weight and contents unknown, not accountable for risk of landing."

Early in July, the plaintiff and some other persons had formed an establishment at Waterloo Bay, under the charge of Capt. Palmer, for the purpose of landing with surf-boats the cargoes of vessels taken up by them to convey goods thither.

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On the 7th and 9th July, 1846, the plaintiff had engaged twelve men to work the last-mentioned surf-boat by their signing the following engagement:—

"Port Elizabeth, 17th July, 1846.

"Mr. J. O. SMITH.

"SIR,—We, the undersigned, agree to go to the coast at or near the Fish River Mouth, for the purpose of working surf-boats in landing goods or merchandise from such ship or ships as you may authorize us to discharge, receiving conjointly at the rate of 5*s.* per ton for all such goods or merchandise landed. We also agree to obey the orders of the person or persons who may be appointed to the charge of landing."—(Then followed the twelve signatures.)

On the 23rd July, after the plaintiff and defendant had agreed to change the destination of the brig *Wm. Woolley* from Buffalo River to Waterloo Bay, the plaintiff engaged other five men to go to Waterloo Bay. This engagement was formed by these men signing the above agreement, below and on the same page with the signatures of the twelve men. These five men were embarked on board the *Wm. Woolley*, as being those whom by the charter-party the plaintiff had bound himself to provide, to work the boats by which he was to land the cargo put on board that vessel by the Commissariat; none of the five was appointed coxswain of the boat, nor had any authority given him over the others.

The vessel arrived at Waterloo Bay on the afternoon of the 3rd August, when the surf-boat brought up by her was got over the side; and next morning all its appurtenances were put into it, along with the above-mentioned five men as her crew. By means of a line laid down from the brig to the nearest vessel, the *Lady Leith*, the surf-boat was hauled alongside the latter, to which there was then a surf-line attached, reaching from the shore, and belonging to the concern under Capt. Palmer's charge. By means of this last-mentioned line the five men hauled the surf-boat to within fifty feet of the shore, when, in consequence of another boat coming off by that line and the roughness of the sea, they were obliged to let go the line, and the boat drifted on the rocks and then on the beach. The men got on shore, and left her there all night. The bottom was slightly injured, but this injury was repaired early next morning by the Commissariat.

The five men applied first to Capt. Palmer, in consequence of having signed the same agreement with the

plaintiff as the other twelve men had done, who were then working for him under the charge of Capt. Palmer. The latter had been previously informed by plaintiff of the nature of the charter-party of the *Wm. Woolley* with defendant, and requested to do anything he could to further the landing of the stores from that vessel. But he, considering that the charter of this vessel was not connected with the concern of which he was manager, and that anything he might do for the *Wm. Woolley* would be as a matter of favour to the plaintiff, refused to victual the five men,—to take them under his charge or orders,—or to consider them as belonging to his establishment,—and maintained that they were the crew of the Government boat, and under the charge of the Commissariat. They, however, ate and drank that evening with the men under Palmer's charge.

Afterwards, on the same evening, the five men went to the Commissariat officer, Mr. Broxholm, to whom a copy of the charter-party had been sent, which, in his opinion, authorized him to ration the men working the surf-boat when on shore. He told them he knew nothing of them as a Government boat's crew, and refused to consider or deal with them as such, but agreed to ration them; and accordingly from the 5th or 6th until the 10th August, they received regular Commissariat rations.

On the 4th or 5th, Capt. Virtue gave notice to the Commissariat that he was ready to discharge cargo. On the 5th, Broxholm requested the boat's crew to proceed to get the boat put in a working condition, so as to land the cargo. The crew refused to work, stating, as their reason, that plaintiff had broken faith with them, maintaining that by their agreement they were entitled to be victualled in the same way as the twelve men who had previously signed it, who were receiving as much victuals at they could consume, while the Commissariat ration was merely a common soldier's ration, without fuel to cook it,—because they had nobody to give them orders about launching the boat and getting the surf-lines laid down, &c., both Mr. Broxholm and Capt. Palmer refusing to take them under their charge, or to give them orders. Mr. Broxholm, who maintained that under the charter-party he had nothing whatever to do with landing the cargo, except to provide a fatigue party to take the cargo out of the boat after it was brought to the shore, applied both to Capt. Palmer and Capt. Virtue to get the surf-lines laid down, both of whom declined doing it, on the ground that it was no part of their duty. In consequence, the boat remained on the beach and no cargo was landed by any one before the 9th August, when, in consequence of the vessel carrying away the purchase of her windlass and

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the hawse pipe, she sailed for Algoa Bay to be repaired. By one boat properly worked, a great part, if not the whole, of the cargo might have been landed between the 4th and the 9th of August.

On the 10th August, after the brig had left Waterloo Bay, and after Mr. Broxholm had, on applying to Capt. Palmer, been informed by him that he had received no instructions about the five men, and would not have anything to do with them, the following written agreement was entered into by them with Mr. Broxholm:—

"Waterloo Bay, 10th August, 1846.

"The undersigned hereby declare the agreement with J. O. Smith to be at an end, he having failed in making the arrangements agreed for their subsistence on shore. The undersigned do now agree to be employed under Mr. Assistant Clerk Broxholm, on the part of Her Majesty, in landing the cargoes of such ships as may be pointed out by him, and to use their best exertions for that purpose, for which services they will be paid conjointly at the rate of 5*s.* 6*d.* per ton, and be further provided with the usual soldier's ration. The undersigned also agree to obey such orders as they may receive from Mr. Broxholm or other officers duly authorized; and this agreement is to remain in force for the space of one month.

"C. BROXHOLM.

"In my presence,—

H. C. CUNLIFFE OWEN, Lt. R.E."

(Signed by the five men.)

Immediately after signing the agreement, the crew, on applying to the Commissariat, got the assistance of a party of Burghers, and launched the surf-boat from the beach, where she had been lying since the 4th, and got a heavy anchor which had been lying a short distance off, idle, and at the disposal of the Commissariat, and which might have been got at any time, down to the beach to make fast the sea lines to. And on the 13th, having previously been prevented by the weather, with the assistance of a boat and two men from the *Emily*, got the surf-lines laid down and carried out to that vessel, from which they commenced to land cargo. On the 18th August, the *Wm. Woolley* returned from Algoa Bay and anchored. Capt. Virtue

sent notice to the Commissariat that he was ready to discharge cargo. No person on the part of the plaintiff took any steps whatever to land cargo, nor applied to the Commissariat for the use of the surf-boat, nor attempted to engage another crew for her, although there were plenty of men on shore procurable for that purpose. On the 19th, three boat-loads of cargo were landed from the *Wm. Woolley*, in boats belonging to the plaintiff's concern, under Capt. Palmer's charge, which were hired and paid for by the Commissariat.

On the 22nd, the Government boat and one boat hired from Capt. Salmond were sent off by the Commissariat to bring cargo from the *Wm. Woolley;* the latter was upset, and the Government boat was towed alongside that brig by her boat, and that of the *Norfolk*, where she was detained by stress of weather until the 25th, when she brought a boat-load on shore.

No cargo was landed by any one from the brig between the 25th and 28th, on which day the brig lost her first anchor and cable, and proceeded to Algoa Bay to procure another.

Between the 18th and 28th, the whole of the cargo of the brig might have been landed; and during a part of this time, boats hired by the Commissariat, as well as the Government surf-boat, were employed in unloading other vessels.

The different voyages of the brig between Waterloo Bay and Algoa Bay, the period during which she remained at each, her several losses of anchors and cables, were proved to have occurred nearly, if not exactly, as stated in the declaration.

There were several discrepancies between the evidence of the witnesses of the parties, as to circumstances occurring between the 28th August and the 12th December. But in consequence of the view of the case ultimately taken by the Court, it became unnecessary for them to come to a decision as to what circumstances occurring subsequently to the 28th August had or had not been proved, except that it was proved that no cargo was landed from the brig at Waterloo Bay after the 25th August; that on the 18th September Capt. Virtue sent a written notice to Mr. Broxholm, that the lay days had expired, and that the vessel was in demurrage. And that on the 13th October, the day before the vessel sailed on her last voyage to Waterloo Bay, the plaintiff wrote to Mr. Palmer, the officer at the head of the Commissariat Department, a letter referring to the conditions of the charter-party—recapitulating the several voyages she had made to Waterloo Bay,

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and her losses there, and stating that, although he had thereby acquired the right of insisting that the cargo should be taken out of the vessel by the Commissariat, he had been desirous to carry out the object at any risk, and proceeding as follows:—"I feel it, however, incumbent on me before I subject your department to any further risk, or to any accumulation of demurrage, to place the case before you, that you may make your own decision in a matter where the risk and expense fall exclusively on your department. I beg, at the same time, that it may be understood that even if I do not now exercise my undoubted right to require the cargo to be landed at present, I do not waive this right."

No answer was returned to this letter, but after it, whether before or after the vessel sailed did not appear, the plaintiff had a personal interview with Mr. Palmer. No evidence was given as to what took place at this interview.

On the 23rd October, the plaintiff gave a written notice to the Commissariat officer at Port Elizabeth, Mr. Hare, to take the cargo out alongside the brig.

On the 30th October, Mr. Hare wrote to the plaintiff protesting against the cargo being discharged, as highly prejudicial to the public service. But on the 3rd November, Mr. Hare wrote to the plaintiff, that, although the Commisssariat did not consider that the plaintiff, had fulfilled his charter-party, the department would take the cargo out with all convenient speed, but without prejudice to any right the Commissariat Department then had to dispute the fact that the plaintiff had not fulfilled the charter-party, and therefore had not earned freight. In a letter of the 4th November, to Mr. Hare, the plaintiff protested that the delivery of the cargo should be without prejudice to his claim for freight and demurrage.

No part of the cargo was taken out of the brig before the 13th November, and she was not completely discharged of cargo before the 12th December.

Ebden, for the plaintiff, maintained that the plaintiff having conveyed the cargo and surf-boat to Waterloo Bay, with five men to work the boat, and given notice that he was ready to land the cargo, had done all that was required of him by the charter-party;—that the non-landing of the cargo before the vessel had lost her first anchor and cable, which entitled the vessel to return to Algoa Bay as if the landing had been impracticable, was therefore the fault of the Commissariat department, and consequently, that the plaintiff had earned the freight;—that even if the plaintiff had been bound by the charter-party to land the cargo with the surf-boat, the crew provided by him for the

purpose had been prevented from doing so by the failure of the Commissariat to have the surf-lines laid so as to enable her to work,—by not having provided an anchor to make fast the surf-lines to on shore,—and by having provided sea anchors too light for the work; and, therefore, that even in this view of the case, he was entitled to freight. He further maintained, that if it should be held that the non-landing of the cargo was to be attributed to the refusal of the crew to work the boats, that refusal had been caused by the Commissariat not having given them rations immediately on landing. He contended that if even under the charter-party the plaintiff had been originally bound to land the cargo, and, from a mistaken construction of that instrument, believing it to be the duty of the Commissariat to do so, had not landed it, yet that, as the Commissariat, after knowing that this was the construction put on the charter-party by the plaintiff, had by landing four boat-loads of cargo in boats provided by themselves, and still more by having allowed and induced the plaintiff to make the last voyage after the plaintiff's construction of the charter-party had been particularly brought under their notice by his letter of the 13th October to Mr. Palmer, thus assented to and acquiesced in the plaintiff's construction of the charter-party, and were thus barred from now attempting to put a different construction on it, according to the rule *consensus tollit errorem*. (See *Smith's Leading Cases, vol.* 2, *p.* 460; *Phillips on Evidence, 9th edition, vol.* 1, *p.* 360.) He maintained, that at all events the plaintiff was entitled to a *pro ratâ* proportion of the freight, in respect of the four boat-loads of cargo which were discharged from the ship at Waterloo Bay, and of the surf-boat and her appurtenances, which had been conveyed there and delivered to the Commissariat officer. He maintained that, under the charter-party, the plaintiff was entitled to demurrage for every day after the expiration of the first thirty days, reckoned from the 4th August, the date of the vessel's first arrival at Waterloo Bay, until the date of the discharge of the last of the cargo in Algoa Bay on the 12th December; and that even if by the terms of the charter-party the plaintiff should be held not to be entitled to claim in respect of it demurrage for the days during which the vessel was lying in Algoa Bay between the day of the last return to that port and the 12th December, yet that, in respect of the improper delay on the part of the Commissariat in then and there discharging the cargo, he was entitled to claim damages for this detention, and that £15 per day, the sum specified for demurrage in the charter-party, was a fair measure by which to estimate the amount of such damage;

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and that the conclusion in the end of the declaration, "or otherwise that the said honourable Court may give such other relief in the premises as may seem meet," was sufficient to enable him to maintain this claim for such damages in the present action.

In his reply, he founded on the above-quoted clause in the bill of lading, stipulating that the cargo was to be delivered alongside, as clearly showing that the construction put on the charter-party by the plaintiff was the true one.

The *Attorney-General*, for the defendant, maintained the contrary of all the propositions contended for by the plaintiff, and quoted *Smith's Leading Cases, vol.* 2. *p.* 1; *Abbot on Shipping, Shee's edit. pp.*, 387, 398, 402; *Daniel's Chancery Practice, vol.* 1, *p.* 489.

The Court held that it was shown by the declaration that this was an action to enforce specific performance of the written contract entered into between the parties by the charter-party which they had mutually executed; for the declaration stated "that the defendant has been summoned to answer the plaintiff in this suit in an action upon a certain charter-party or agreement hereafter mentioned," and after setting forth the allegations of fact on which the plaintiff's claim was founded, stated that "the sum of £1,424 0*s.* 5*d.* became, and was, and still is due and payable from the said defendant, in his said capacity, to said plaintiff for freight," &c., and that "the sum of £1,515 hath become due and payable for demurrage," &c., &c., "according to the tenor and effect of the said charter-party or agreement," &c., &c.; "wherefore the plaintiff prays that the defendant in his said capacity, may be condemned by judgment of this honourable Court to pay to the plaintiff the said several sums of £1,424 0*s.* 5*d.* and £1,515," &c. That, to entitle the plaintiff to have the defendant condemned to perform the conditions in the charter-party obligatory on him, the defendant, the plaintiff must show either that he himself has performed all the conditions thereof which were obligatory on him,—or at least that, having been ready and willing to perform all of them, he was prevented by the improper act, neglect, or omission of the defendant from doing so. That, according to the true construction of the charter-party, the plaintiff was bound not only to cause the stores to be carried in the vessel to Waterloo Bay, but to land the same there if practicable, and also to provide men to work the boats, and that after the Commissariat had put on board the stipulated cargo and a surf-boat, with the necessary warps, lines, &c., &c., which it was proved they had done, they were under no obligation whatever in any

way to interfere, or give assistance of any kind, in landing the cargo, until the stores had been brought from the vessel to the landing-place, when they were bound to furnish a working party to take the stores out of the boats at the landing-place. That the clause in the bills of lading was neither intended to have nor could have any effect, except to free the master and crew of the vessel from doing more than delivering the stores alongside, and did not in any way relieve the plaintiff from his obligation to take the goods from alongside, and bring them to the landing-place. That even if it were held that the Commissariat were bound to provide the large anchor to which to make fast the surf-line on shore, it was proved that they had such an anchor lying close to the beach at their disposal, and ready to be supplied for the above purpose as soon as the plaintiff, or those who acted for him, had applied for it. That the surf-boat was proved, after she had been abandoned by the plaintiff's crew, to have been worked with the surf-lines and sea anchors sent by the Commissariat, and that when a heavier sea anchor was considered expedient it was immediately provided by the Commissariat, as it would undoubtedly have been if the plaintiff had applied for it. That, consequently, the Commissariat had done everything which, under the charter-party, it was their duty to do, previously to the stores being brought to the landing-place and consequently had neither done, nor omitted to do any thing by which the plaintiff was prevented from performing the obligation incumbent on him of bringing the stores from the ship to the landing-place. That it was admitted that the plaintiff had not brought the stores from the vessel to the landing-place, and proved that he had not provided a crew to work the boat, because it was proved that the men whom the plaintiff had sent up for that purpose refused to work her, and threw up their agreement with plaintiff, on the ground that he had not duly performed his part of it. That the refusal of the crew to work the boat was not owing to the improper conduct of the Commissariat officer in refusing or failing duly to supply these men with rations, because by the charter-party the Commissariat were only obliged to provide rations "when the men working the said boats are on shore," and the crew sent up by plaintiff never did work the boats; and consequently the Commissariat were not bound to have given them a single ration, whereas it was proved that Mr. Broxholm gave them rations as soon as they applied for them. That it was proved that at least a great part of the cargo might have been landed between the 4th and 9th August, and the whole of it certainly during the vessel's second trip, and previously to

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the 28th August, when she first lost an anchor and cable. It was, therefore, proved that the plaintiff had completely failed to perform his obligation to land the goods, as he might and ought to have done, and therefore had barred himself from claiming from the defendant the freight, under the provisions of the contract. That whether this failure to land the cargo was a wilful breach of the charter-party by the plaintiff, or proceeded from his having mistaken the true construction of it, or his neglect to provide a coxswain to the boat's crew, or to give Capt. Virtue or Capt. Palmer authority to act for him, and do what was necessary to land the cargo, or was owing to the failure of the crew, or of Capts. Virtue or Palmer, to do what they ought to have done, was of no consequence whatever in a question between him and the defendant. That the defendant had a right, on the vessel's return to Waterloo Bay after the 28th August, to take out and land with boats provided by him as much cargo as he thought fit, without to any extent freeing the plaintiff from any obligation which, either by the charter-party or by his improper failure to land the cargo before the 28th August, he had contracted in favour of the defendant. That all the subsequent voyages made by the vessel must be held to have been attempts made by plaintiff at his own risk, to repair the effects of his original failure to land the goods. That by allowing him to make the last voyage, the Commissariat had done nothing which could in law bar them from now maintaining that the plaintiff had not performed his part of the contract. That the general conclusion at the end of the declaration, founded on by the plaintiff, only entitled plaintiff to claim, under it, such other relief as he could completely claim by an action in that particular form, namely, an action for the specific performance of the written contract set forth in the declaration;—that, therefore, even although the plaintiff might have a claim against the defendant for some remuneration for his work and labour in carrying from Algoa Bay to Waterloo Bay the surf-boat and the four boat-loads of stores which the defendant had caused to be landed there at his own expense, he could only make it effectual by an action in a different form, and not in the present, the declaration in which contained neither allegations of fact nor conclusions therefrom, applicable to a claim for such remuneration. That the clause in the charter-party respecting demurrage stipulated only for demurrage for the vessel's detention in Waterloo Bay after she had been thirty days there; and, consequently, as she had not been at Waterloo Bay so much as thirty days, during the course of all her voyages there, the plaintiff, even if he had not

been barred by his failure to perform his obligations under the charter-party, was not entitled to claim any demurrage whatever, much less demurrage for the time the vessel had consumed in making the voyages from and to Algoa Bay, and during which she had been lying in that bay. That although the plaintiff might have a claim for damages against the defendant for having improperly detained the vessel in Algoa Bay from the date of her last return there till the 12th December, by neglecting to discharge her cargo in due time, he could not claim those damages under the charter-party, and therefore for the reasons above given, could not legally seek to obtain those damages in the present action, but must for that purpose have recourse to an action in a different form.

On these grounds, the Court gave judgment for the defendant, with costs.

MENZIES' REPORTS.

[NEW SERIES.]

1828–1849.

VOL. III. PART III.

CHAPTER I.

INSOLVENCY.

IN RE ESTATE VAN AS.
WHITCOMB *vs.* VAN AS'S EXECUTORS;
DISCOUNT BANK *vs.* VAN AS'S EXECUTORS.

Assignation by an uncertificated insolvent, of property acquired after insolvency, when good. 1828. Dec. 31.

Insolvent, uncertificated, his estate entitled to property acquired after insolvency.

[Vol. I, p. 339.]

COMMISSIONER FOR THE SEQUESTRATOR *vs.* VOS.

Sale on credit, non reclamation of goods. Dominium.

G. sold and delivered on credit certain wine to W., whose estate was afterwards sequestrated. G. within six weeks reclaimed the wine or its proceeds. HELD, *that* March 11. Dec. 19.

the sale having been on credit, the dominium was vested in W., and G. was not entitled to reclaim or to a preference in W.'s insolvency.

[Vol. I, p. 286.]

HARE, Q.Q., *vs.* CROESER.

Excussion. Liquidation Account.

1828. March 27. *A deficiency on the face of the confirmed final liquidation account of a principal debtor's estate, and a certificate by the Sequestrator that the debtor had no other property, is a sufficient excussion of the surety to a bond by such principal debtor.*

[Vol. I, p. 293.]

NISBET AND DICKSON *vs.* RICHARDSON.

Liquidation Account. Civil Imprisonment.

April 1. *Liquidation account of insolvent estate, unconfirmed, not a final sentence; and this, although framed in terms of an order of Court setting aside a former account. Decree of civil imprisonment, execution of, stayed accordingly.*

[Vol. I, p. 298.]

IN RE LOLLY.—COMMISSARIES OF VENDUE *vs.* SEQUESTRATOR.

Fisc, preference of.

1829. March 19. *Fisc ranked preferent on estate of insolvent Pachter, for pacht money in arrear.*

[Vol. I, p. 368.]

IN RE LAUBSCHER.—MOLLER, Q.Q. SUNDRY CREDITORS, *vs.* SEQUESTRATOR AND OTHERS.

Sequestration, release from (old law).

No release from sequestration can take place before the expiration of the period allowed to creditors to lodge their claims, nor effectual against the creditors who have not consented to such release. 1879. June 2.

A person discharging the debt of an insolvent after surrender, entitled to rank in the same order as the creditor whose claim has been discharged would have ranked.

[Vol. I, p. 372.]

DE VILLIERS' TUTOR *vs.* STUCKERIS.

Guardian not ipso facto deprived of office by his insolvency, and cannot be removed on ground of such insolvency, after due rehabilitation. June 16.

[Vol. I, p. 377.]

IN RE RICHARDSON.—WOUTERSEN'S EXECUTORS, Q.Q. WIDOW PALMER, *vs.* NISBET AND DICKSON.

Appeal by an insolvent whose estate is under sequestration is incompetent. 1830. Feb. 23.

[Vol. I, p. 419.]

IN RE INSOLVENT ESTATE DE VILLIERS.—DE VILLIERS *vs.* CAUVIN AND SEQUESTRATOR.

Rehabilitation.

Rehabilitation, what effect of on property not disposed of by distribution account. The Court, by majority (MENZIES, J., *dis.*), *awarded it to the creditors.* Jan 12.

[Vol. I, p. 414.]

STORM *vs.* BREDA AND ANOTHER.

Execution.

1830. Sept. 28. *Printing press and materials not exempt from execution in insolvency, as being tools of trade.*

[Vol. I, p. 476.]

IN RE BLANCKENBERG.

Ordinance 64, § 84 (6 *of* 1843, § 110).

Sept. 28. Dec. 9. *Objection to ranking of debt, how to be made.*

[Vol. I, p. 477.]

IN RE RUSSOUW.

Sept. 28. *Liquidation account amended by awarding preference to a prior general hypothec over a special hypothec of movables, not followed by possession.*

[Vol. I, p. 479.]

WITHAM, Q.Q. LA FORET, *vs.* NOURSE.

Sept. 30. *Sequestration under old law. Where a partnership estate is sequestrated, the rehabilitation of a partner, whose private estate had not been surrendered, not effectual against his private creditor.*

Creditor absent when rehabilitation granted may afterwards object to its validity, any matter which, if duly summoned, he might have put forward.

[Vol. I, p. 485.]

IN RE THERON.

1831. March 15. *Landed property in an insolvent estate not realizing at public auction the amount of the mortgage, and left unsold at the instance of the mortgagee, the debt or liability of the insolvent mortgagor is not thereby destroyed.*

[Vol. I, p. 508.]

VILLIERS *vs.* LE RICHE.

Civil Imprisonment.

An insolvent, after the liquidation account has been confirmed, is entitled to oppose a decree of civil imprisonment by objecting to the legality of the claim proved in his estate. 1831. March 29.

Sequestration under old law. Liquidation account, when confirmed is res judicata only as to assets awarded and distributed.

[Vol. I, p. 518.]

IN RE HOFFLER.

Ordinance No. 64, §§ 29, 95; *Ordinance* 6, 43, §§ 22, 124.

Civil imprisonment suspended during subsistence of sequestration and insolvent liberated. May 23.

[Vol. I, p. 526.]

IN RE FORBES.

Ordinance No. 64.

An insolvent could not surrender a second time while the first sequestration subsists.

[But under Ordinance 6 of 1843, §§ 128, 9, it is at the discretion of the Judges so to accept subsequent surrender.]

In this case, the Court set aside a second order of sequestration, made on the voluntary surrender of Forbes, on the ground that a previous sequestration was still subsisting, and consequently that the insolvent has no estate which he could surrender, all his estate being under the administration of his trustee. *In re* Forbes.

[*Et vide In re* MAGODAS, *post.*]

IN RE PHILLIPS:—PHILLIPS' CREDITORS *vs.* PHILLIPS.

Ordinance No. 64, §§ 16 *and* 44. [*No.* 6 *of* 1843, §§ 9 *and* 17.]

Partnership. Insolvency.

Act of insolvency committed by one partner quâ partner, justifies the sequestration of partnership estate, without proof that all the partners had committed acts of insolvency or had all made voluntary surrender.

1832. Nov. 14.

Phillips' Creditors *vs.* Phillips.

In this case (Ordinance No. 64 being still in force), a doubt was expressed by WYLDE, C.J., as to whether, although an order of sequestration could be made in consequence of the act of insolvency committed by one partner *quâ* partner with intent or in such manner as to defraud the creditors of the company, or to defeat or delay them in obtaining payment of the debts due by such company, the company estate could afterwards, by sentence of the Supreme Court, be finally adjudged to be sequestrated, unless it was proved that all the partners of the company had committed acts of insolvency, or the estate had been voluntarily surrendered by all of them.

The majority of the Court held that, under the 16th and 24th clauses, as no cause to the contrary was now shown by any person, the Court was authorized and required to adjudge the estate to be sequestrated, in consequence of the act of insolvency committed by the partner against whom the creditors had petitioned.

WYLDE, C.J., concurred in this opinion on this view of the provisions of the clauses, his only doubt having been, whether the words of the 16th clause were sufficient to warrant such a construction; and as the opinion of the other Judges was, that the words were sufficient to bear such construction, he should in future give them that construction, until a case should arise in which, after argument, it should be shown that this construction was erroneous.

[Sections 9 and 17 of Ordinance 6 of 1843, correspond to sections 16 and 24 of Ordinance No. 64. The words of section 16 of Ordinance 64 were so altered in section 9 of Ordinance 6 of 1843 as legislatively to affirm the construction of the Court *ut supra*.]

THEUNISSEN *vs.* VOLKWYN.

Sequestration under old law, § 54. *Rehabilitation.*

Rehabilitation did not discharge insolvent from creditor who had not claimed in estate whilst under sequestration.

But see Ordinance 6 *of* 1843, § 120.

1832. Dec. 1.

Theunissen *vs.* Volkwyn.

This was an action for a debt. The defence was, that it was contracted before the defendant's sequestration, that defendant had been rehabilitated, and consequently discharged from all previous debts.

Replied. Plaintiff had not claimed under the sequestration.

Provisional sentence refused with costs.

WYLDE, C.J., had some doubts as to the meaning of the terms in § 54 of the Sequestrator's instructions, which made him desirous of having the point argued. But as this could be done in the principal case, he did not oppose the judgment proposed by the other two Judges.

(*Vide La Foret* vs. *Nourse, 30th September*, 1830, *p.* 485, *vol.* 1; *and Zeyler* vs. *Muller, 12th October*, 1837, *post; De Vos* vs. *Brink, post.*)

ROSS AND OTHERS *vs.* MUNTINGH.

1833. Feb. 5.

Provisional sentence given on a promissory note against an executor, the maker, although the estate was subsequently surrendered as insolvent.

[Vol. 1, p. 39.]

IN RE WHITCOMB.—DENEYS *vs.* STEYN.

Ordinance No. 64, § 40 (*No.* 6 *of* 1843, § 33).

Interest. Preference.

Interest must be paid to a creditor up to the date of the payment of his claim, and not merely up to the date of the surrender of the estate.

1833. June 18. *In re* Whitcomb. —Deneys vs. Steyn.

The *Attorney-General*, for Deneys, moved to make absolute a rule which he had obtained, calling on Steyn to show cause why the preference awarded to the latter in the plan of distribution should not be recalled, and preference awarded to Deneys for interest due for the period from the surrender of the estate up to the time he received payment of his debt.

The Master's report was in the following terms: "Mr. Deneys was holder of a mortgage upon a house in George-street belonging to the insolvent for £1,000, the net proceeds arising from the sale of which were insufficient to pay the debt, together with the interest reckoned thereon to the date of the surrender of the estate, and left a deficiency of £48 14*s.* 6½*d.*, which said deficiency was, by virtue of the general mortgage in the said estate, awarded to him in preference out of the proceeds of the movable property."

The point in dispute was, whether a creditor is entitled to interest up to the date of payment, or only up to the surrender of the estate? Deneys had been awarded full payment of the principal and the interest thereon to the date of the insolvency, but not to the date of payment.

The Court made the rule absolute with costs, in respect of the 40th section of the Ordinance No. 64.

[*Vide In re Meiring.—Cloete* vs. *Aling*, *3rd December*, 1833. *Vol. II, Part* 2, *p.* 318.]

SILBERBAUER, Q.Q. DAVIS, *vs.* MCDONALD AND SUTHERLAND.

Dec. 10.

An uncertificated insolvent may be a mandatary.

[Vol. II, Part 2 (continued), p. 185.]

IN RE ROUX.—RYNEVELD *vs.* JURITZ.

Dec. 19.

A medical man has no preference for medicines supplied before insolvency to an insolvent alive when his estate was sequestrated.

[Vol. II, Part 3, p. 318.]

SIMPSON AND COMPANY *vs.* FLECK.

Ordinance No. 64, §§ 5, 12, 18, 24, *and* 25.

Ordinance 6 *of* 1843, §§ 5, 11, 17, *and* 18.

Partnership.

Where a petition for compulsory sequestration sets out more acts of insolvency than one, but the summons for adjudication only one, the Court will receive proof of all the acts stated in the petition, on amendment of the summons, giving time to defendant, if necessary.

One partner of a firm may petition for sequestration on a firm debt.

Petition for sequestration, what it is sufficient to set out.

It is sufficient if the petitioning creditor's debt exists at the date of petition, without reference to whether it existed or not before the insolvency.

Meaning of word insolvency *in Section* 5, *Ordinance* 64 (*Section* 88, *Ordinance* 6, 43).

1833. Nov. 12. — Simpson & Co. *vs.* Fleck.

The estate of Fleck had, on the 31st October, 1833, been placed under sequestration by a Judge at chambers, in terms of the 12th section of Ordinance No. 64, on a petition presented by Joseph Simpson, for himself and his co-partners, Thos. Simpson and John R. Simpson, trading under the firm of Simpson Brothers & Co., setting forth that Fleck is justly and truly indebted unto the said Simpson Brothers & Co. in a sum of £1,332 9*s.* 7*d.*, upon and by virtue of certain eight bills of exchange (therein described by the dates when made, when due, and by their several and respective amounts), drawn by Le Breton & Jerram, trading under the firm, &c., upon and accepted by Reeves & Mills, trading under, &c., payable to the order of the said Le Breton & Jerram, and by them and the said Fleck indorsed in blank, which said several bills were presented for payment as they respectively became due, but were not paid, of which the said Le Breton and Jerram and Fleck had due notice. And in a further sum of £1,442, upon and by virtue of certain three promissory notes (therein described by the dates of when made and when due, and by their several and respective amounts), made by the said Le Breton & Jerram payable to Fleck, and by

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him indorsed in blank, which said promissory notes were presented for payment as they respectively became due, but were not paid, of which the said Fleck had due notice. That the said J. C. Fleck did, on the 1st March, 1833, by a certain mortgage bond duly made and passed before the Registrar of Mortgages, &c., alienate certain of his fixed property (describing the same), which formed part of the joint estate of the said Fleck and his wife, to his son, C. Fleck, &c., and his son-in-law, M. H. Borcherds, &c., without valuable or onerous consideration, the said Fleck being at the time of said alienation actually insolvent, or being rendered so thereby; and the said Fleck did thereby commit an act of insolvency.

The petition also set forth another act of insolvency (which it is unnecessary here to set forth), alleged to have been committed on the 14th November, 1832.

Along with the petition there was produced to the Judge an affidavit, the averments of which were equally minute and specific with, and completely supported, all the allegations in the petition, both as to the cause of debt and the act of insolvency.

The plaintiff thereupon, in terms of the 24th section of the Ordinance, took out a summons against Fleck to appear before the Supreme Court on the 12th November next, to show cause why his estate should not, by sentence of the said Court, be adjudged to be sequestrated for the benefit of his creditors.

The *Attorney-General*, for the defendant, this day appeared, denied the facts alleged by plaintiffs, and opposed the adjudication of the sequestration.

Evidence was then led by both parties.

After the plaintiff had closed his evidence, the *Attorney-General* stated that the only act of insolvency set forth in the summons was the execution of the mortgage bond on the 1st March, 1833, and therefore that it was not competent for the plaintiffs to prove, nor was it now necessary for the defendant to disprove, the other act of insolvency stated in the petition to have been committed on the 14th November, 1832, and referred to *Mr. Justice Burton's Observations on the Ordinance No.* 64, *page* 64.

The Court unanimously held that, although it was highly expedient that the directions given and forms suggested by Justice Burton in his said Commentary should be observed in practice, yet that, in deciding this point, they were bound to look only to the 24th and 25th sections of the Ordinance, and that, under the provisions of the 25th section, they could not dismiss the petition, unless the petitioner made default in proving the

acts of insolvency set forth in the petition; although it might be doubted whether, as the summons referred exclusively to one act of insolvency, the petitioner might not be bound, before giving evidence of any other acts of insolvency set forth in the petition, to obtain leave to amend his summons, so as to prepare the defendant, and give him sufficient notice to enable him to disprove the other acts of insolvency.

Whereupon *Cloete*, for the plaintiff, stated that he did not insist on any other act of insolvency than that alleged to have been committed on the 1st March.

After the counsel for both parties had been heard in support of and in answer to the objections to the adjudication of the sequestration which had been maintained by the defendant, the following points were decided by the majority of the Court (MENZIES and KEKEWICH, J.J.)

They held that, under the provisions of the 18th section of Ordinance No. 64, any one partner of a firm might *per se*, for himself and copartners, petition for sequestration in respect of a debt due to the firm. (*Vide Appendix to Burton's Commentary, p.* 54. *Eden on Bankruptcy, p.* 42. *19th Vesey, p.* 293.) And that the plaintiff, as the only partner of the firm in this Colony, might have done so independently of the provisions of the 18th section, more especially when, as in this case, the debt had been contracted with the firm while he was the managing partner, and the only one in the Colony.

The *Attorney-General* had objected that the petition was insufficient to support the application for the sequestration, in respect that it and the affidavit did not sufficiently set out Fleck's liability, inasmuch as it did not state the consideration given for the debt, nor presentment of the bills to any particular person, and merely alleged that payment had not been made.

They held that, as to the affidavit, the Court had nothing to do with its contents; it is required by the Ordinance merely for the purpose of furnishing *prima facie* evidence of the debt to the single Judge who makes the order for the sequestration. His order is final as far as it goes; he may have given it in error, but the sole discretion of giving or refusing the order is vested in him.

The Supreme Court have no jurisdiction, except that given them by the 24th and 25th sections, which jurisdiction is not to affirm or annul the Judge's preliminary order, but merely to determine whether the Court shall or shall not by its sentence adjudge the estate to be sequestrated; and this decision of the Court is to be given in respect of proof made to them, and not of the affidavit produced to the Judge.

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2ndly. They held that the cause of debt was sufficiently set forth for the purposes of the Ordinance in the petition (and consequently in the affidavit, which averred everything alleged in the petition).

1st. Because it is not necessary to state that any consideration had been given for the bills and notes. (*Vide Bayley on Bills*, 315; *Chitty on Bills*, 451; *Tidd's Practice*, 1,437.)

2nd. By presentment, due presentment is implied.

3rd. That a simple averment of non-payment is sufficient, because non-payment by every person who ought to have paid is thereby implied.

4th. That Fleck's liability was sufficiently set out, without stating that any demand had been made on him. The averment that he was justly indebted in the bills and notes, coupled with the averments of his having indorsed them in blank, of their non-payment, and of his having had due notice thereof, being fully sufficient; and that no principle could be shown for requiring any further averments than were contained in the petition.

(*Vide* 6 *Geo.* 4, *c.* 16, § 13; *Eden on Bankruptcy, pages* 42, 51, 52, 53, *and* 54; *Geo.* 3, *c.* 137, *and Bell's Comts.* 2, *p.* 363, as to what a creditor is required to do in England and Scotland.)

The *Attorney-General* had objected that the debts of the petitioning creditor arose from indorsations to him of bills, which indorsations had been made subsequently to the act, of insolvency, and that to make the petitioning creditor's debt sufficient, it must have existed before the commission of the act of insolvency.

They held that even if the rule of the law of England on this point had been introduced into the law of this Colony, the fact that the indorsations were made to furnish the means of paying debts due by Fleck to the petitioning creditor previously to the act of insolvency, would bring this case under the principle of the English decision, quoted in *Eden on Bankruptcy*, 47, 48, and the debt petitioned on here would, even under the English law, be a sufficient debt to support the petition.

But they held that the English rule has not been introduced into this Colony by the Ordinance No. 64, and that it is evident, from a comparison of the terms used in the 12th section with those used in the 6th and 27th sections, that all that is required is, that the petitioning creditor's debt should exist at the date of the petition, without regard to whether it had or had not existed before the act of insolvency had been committed.

The *Attorney-General* had maintained that the term "insolvency" in the 5th section of Ordinance No. 64, means

not actual insolvency, *i.e.*, an insufficiency of assets to pay the insolvent's debts when they shall have become due, but merely an inability to meet the demands made on the debtor in the ordinary course of trade; and that, therefore, a person, so long as he pays each demand made on him as it comes in, is not insolvent in the sense in which that word is used in the Ordinance, although at the time his whole assets may be insufficient for the payment of all his debts, if they were all then due and demanded.

They held that it had been proved that Fleck, on the 1st March, 1833, was "insolvent" in the sense in which that term is used in the 5th section of the Ordinance No. 64. Because the firm of Fleck, Le Breton, & Jerram, of which Fleck had been a partner, and which had been dissolved on the 1st November, 1832, was insolvent both on that day and also on the 1st March, 1833, because, in consequence of that insolvency on the 1st November, 1832, even if the firm had not then been dissolved by the partners, action might after that day have been brought against all the partners, not only in their capacity as partners, but as individuals, and judgment given against them in both capacities, without the necessity of a previous excussion of the assets of the firm; because, immediately on the dissolution of the firm, each partner individually became instantly and directly liable, and might immediately be sued individually for all debts contracted by the firm prior to its dissolution, and because it was proved by the evidence in the case, and the report of the Master, dated 25th November, 1833, that in consequence of Fleck's liability for the debts of the firm of Fleck, Le Breton, & Jerram, not only were Fleck's assets, on the 1st of March, insufficient to discharge all his debts, but that on that day they were not available for the discharge of such of his debts as had become due and payable previous to that day.

They held that the books of Fleck, Le Breton, & Jerram were evidence against Fleck in a question with third parties, and that the Master was justified in using them as evidence to prove the amount of Fleck's debts.

That the books of the firm of Le Breton & Jerram, which had been formed on the dissolution of Fleck, Le Breton, & Jerram, were not evidence against Fleck, but that the Master's report could not be objected to on that ground, because they had been used by the Master to furnish evidence in his favour, and not against him.

They held that it is only incumbent on the petitioning creditor to prove the amount of the defendant's debts, and that it is for the defendant to prove the amount of his assets, if he alleges that they are sufficient for the discharge

1833. Nov. 12.

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of his debts, and that the plaintiff is not under the necessity of proving the insufficiency of the assets for that purpose.

On these grounds, the majority of the Court adjudged the sequestration of the estate of the defendant, in terms of the 25th section of Ordinance No. 64.

WYLDE, C.J., dissented from this judgment, and from the decision of the majority upon many, if not all, of the points above mentioned, and was of opinion that the order for sequestration should be superseded, and the petition dismissed.

IN RE MEIRING.—CLOETE *vs.* ALING.

Ordinance No. 64, § 40 (*No.* 6 *of* 1843, § 33.)

1834. March 1.

The holder of a mortgage bond is entitled in preference on the debtor's sequestration, not to full arrears of interest which may be due on the bond, but only to interest for one year in addition to that for the current year.

[Vol. II, Part 3, p. 318.]

DU TOIT *vs.* VOS.

Aug. 28.

There were twenty-five sureties for 1,000*f. each, for a sum of* 25,000*f., which sum, after a payment in reduction by the principal debtor of* 5,000*f., and by eight of the sureties of* 8,000*f., became* 12,000*f. Plaintiff, a ninth surety, paid this balance, took cession of the bond, and brought action against defendant, a tenth surety, for* $\frac{1}{15}$ *share of the* 12,000*f., being* $\frac{1}{8}$ *of the* 20,000*f. unpaid by the principal debtor, and a proportion for four insolvent sureties.* HELD, *he was liable for* $\frac{1}{8}$ *of the* 20,000*f., but not under the stipulations of the bond liable for the deficiency caused to plaintiff by the insolvency of the four sureties.*

[Vol. II, Part 1, p. 16.]

In re J. & A. Le Riche.

Ordinance No. 64, § 3. (*Ordinance* 6, 43, § 3.)

Order for Sequestration.

Sheriff. Pignus Prætorium.

A partnership estate can only be sequestrated on petition of all the partners, if in the Colony.

Where such partnership estate was erroneously sequestrated on the petition of only one partner, and the order lodged with the Sheriff, there were also lodged with the Sheriff writs taken out subsequently to the erroneous surrender, by creditors of the partnership. The Sheriff suspended execution. On motion made to the Court, the erroneous surrender was quashed. All the partners then presented a petition for surrender in due form. A question arose as to whether the execution creditors would, under the circumstances, be entitled to a pignus prætorium by virtue of their suspended writs, but the Court found the creditors not entitled to insist that no order should be made on the new petition until after the lapse of a sufficient time, to allow the Sheriff to execute the writs.

1834. Dec. 11. — *In re* J. & A. Le Riche.

On the 1st December, Sutherland and Waters & Herron, two of the creditors of the company of J. & A. Le Riche, claimed and obtained, in separate actions, provisional sentences against the two partners composing the said company, nothwithstanding that the estate of the said company had previously been placed under sequestration as insolvent, on the petition of one of the said partners, because, under the provisions of the Ordinance No. 64, section 3, both the partners being in the Colony, it was not competent for one of them to surrender the company estate.

The creditors took out writs of execution.

The order of sequestration had been lodged with the Sheriff, and on the creditors lodging those writs for execution, the Sheriff refused to proceed to execute the writs until the said order of sequestration should be quashed or discharged.

A motion was subsequently made to the Court to quash or discharge the said order, but from want of due notice to the partner who had surrendered the estate, and of evidence by affidavit that the other partner was in the Colony, the motion could not be heard and disposed of until this day, when the Court discharged the order of sequestration.

1834. Dec. 11.

In re J. & A. Le Riche.

Before the Court sat this day, both the partners presented a petition to the Chief Justice to have the estate of the company placed under sequestration, but as had been agreed on by all the Judges, he declined to accept the surrender until the previous order should have been quashed.

After the order had been quashed, the question arose, whether, on account of the execution of the writs, by which the creditors would have acquired a *pignus prætorium*, having been suspended by the effect of an order which the Court had now found to have been null, the creditors were not entitled to insist that no order of sequestration should be made on the petition of the two partners, until after the lapse of a sufficient time to allow of the Sheriff's proceeding with the execution of the writs, and attaching the property of the company.

After hearing Counsel, the Court were of opinion that any Judge to whom the said last-mentioned petition for sequestration should now be presented ought, without any delay, to accept the surrender of the estate, although the consequence would be to prevent the creditors, execution of whose writs had been suspended by the former order now declared null, from now acquiring a *pignus prætorium*; and the Chief Justice accordingly accepted the surrender, and made the order for sequestration.

No decision was given as to what would have been the state of the case, if, previously to the discharge of the null order of sequestration, the creditors had indemnified the Sheriff, and he had proceeded to execute the writs, and had attached the property of the company.

In re Webster.—Anderson & Others *vs.* Webster.

Compulsory Sequestration.

Ordinance 64, § 4. (*Ordinance* 6, 1843, § 4.)

Sheriff's Return.

Construction and effect of the words "thereunto required" in § 4.

1835. May 12.

In re Webster.—Anderson and Others *vs.* Webster.

In this case, certain of Webster's creditors petitioned that his estate should be placed under sequestration, and an order of sequestration was made thereon. On the day appointed for Webster to show cause why his estate should not be adjudged to be sequestrated, the *Attorney-General*, for

Webster, objected that no sufficient act of insolvency had been proved, inasmuch as, although in consequence of the insolvent's not having lodged any statement of his intention to dispute any of the facts stated in the petition, all those facts must be taken as proved, yet as the petition merely set forth that the petitioners having caused a writ to be sued out for the execution of the sentence obtained by them against Webster, "that it appears by the return made by the said Sheriff that the goods and chattels of the said Webster, have only produced £5 3*s*., which he has rendered to the said A. B., and that he has found no other goods or chattels of the said defendant, whereof he could cause to be made the deficiency of the said writ or any part thereof." As the return of the Sheriff was in the terms above set forth, and as the petitioners had produced no other evidence whatever, they had failed to prove one of the *essentialia* required by section 4 of the Ordinance No. 64, viz., that Webster *had been required* by the officer charged with the execution of the writ to satisfy the same, or to point out sufficient disposable property.

The Court held that the words "being thereunto required shall not *satisfy the same*," constituted a distinct act of insolvency, and that the words "*being thereunto required*" had no connection whatever with the clause, "*or shall not point out*," &c., &c., and that the return of the Sheriff in this case was sufficient to prove that the insolvent had committed the act of insolvency, which is created by the words "or shall not point out to the officer charged with the execution thereof sufficient disposable property to satisfy the same, and if it shall appear from the return made by such officer, or his affidavit, that he has not found sufficient disposable property of such person to satisfy such sentence," and adjudged the estate of Webster to be sequestrated.

Rens *vs.* Bam's Trustee.

May 29.

In an action against the trustee of an insolvent estate claiming certain property, the plaintiff alleged purchases from the insolvent on two occasions, several months before the insolvency, and in proof thereof produced notarial agreements of sale and purchase in which all his right and title in the movables were stated to be ceded and transferred by the insolvent to the plaintiff, and the plaintiff let to the insolvent, who hired the same, the movables at a monthly rent for a time within

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which the insolvent should have the right of a purchase at the price paid to him. And called evidence to show that, on the premises of the insolvent, the property had been pointed out to a neighbour as having been sold to the plaintiff by the insolvent, and let to the insolvent by the plaintiff. The Court held that there was no proof of such a bonâ fide sale, and real and bonâ fide delivery, as was in law sufficient to divest the insolvent of the right of property (jus dominii).

[Vol II, Part 2, p. 3.]

MEESER *vs.* MULDER.

Ordinance 64, § 81. (*Ordinance* 6, 1843, § 106.)

Non-consenting creditors entitled to the full amount of their debt, notwithstanding a composition in insolvency.

Aug. 1.

Meeser vs. Mulder.

In this case the defendant's estate had been placed under sequestration after the date of contracting the debt sued for. It had afterwards been released from sequestration, in consequence of a composition, duly consented to by the requisite number of creditors, but the plaintiff had not consented to the composition. Plaintiff now sued for the whole amount of the original debt.

Defendant maintained that he could only now be sued for the amount of the composition applicable to this debt.

After referring to the 81st section of the Ordinance No. 64, the Court granted provisional sentence as prayed, for the whole amount of the original debt.

[*Same decided in Serrurier* vs. *Heuser*, 31*st August*, 1839; *et vide Haneke* vs. *Breda & Heuser*, 10*th January*, 1832; *and De Smidt* vs. *Blankenberg*, 3*rd August*, 1843.]

IN RE ANDERSON.—DIELEMAN *vs.* ANDERSON.

Ordinance 64, § 34. (*Ordinance* 6, 1843, § 27.)

Master, rejection of proof of debt by. Trustee, power of to admit proof.

Jurisdiction of Court.

The Court has no jurisdiction under Ordinance 64, § 34 (*No.* 6. 1843, § 27), *until after the Master has defi-*

nitely rejected a claim sought to be proved. And when the Master has not sufficient proof before him to admit a proof of debt, he ought expressly to reject it, and not enter it short.

A trustee has no right to admit a proof of debt not admitted by the Master, although he has the consent of a majority of creditors.

No one who is not a creditor having duly proved his debt has locus standi to set aside a sale in the insolvency.

1835. Nov. 28.

In re Anderson. —Dieleman *vs.* Anderson.

The Widow Dieleman had married G. Anderson, reserving from the community of goods the property she possessed at the time of her second marriage.

After her death, her separate estate was placed under sequestration as insolvent.

The following is an extract of that part of the minutes of the first meeting of her creditors, held on the 20th December, 1834, which relates to the claims then made for the proof of debts:—

The following persons proved debts against the estate of the said Adriaan Anderson, born Berrange, that is to say:

No. of Proof.	Name of the Creditor.	Particulars of Debt.	Amount of Debt.		
		CLAIM.	Rds.	Sk.	St.
No. 1.	George Anderson ...	The Balance of an Account-Current, 19,080rds. 5st.			
„ 1.	G. H. Meyer ...	For Suretyship by him as per Receipt	109	7	2½
„ 2.	The Executors in the Estate of the deceased...	For Disbursements ...	140	0	0
„ 3.	G. H. Meyer for Aletta Coffin... ...	Per Account for Washing in the years 1831, 1832, and 1833	144	0	0
„ 4.	A. Dieleman ...	Per Account for Funeral Expenses, paid 346rds. 6sk. 4st.	931	4	4
		Per Account for Sundries 584rds. 6sk.			

1835.
Nov. 28.
—
In re Anderson.
—Dieleman *vs.*
Anderson.

The Master being of opinion (as appeared from his subsequent report) that Anderson's claim had not been substantiated by proof, entered it *short* in the minutes, as shown above, but did not reject it. Anderson, holding that it had been rejected, applied in July, 1835, to the Supreme Court, under the provision of the 34th section of Ordinance No. 64, to admit his claim. The Court (MENZIES, J., absent on circuit) held that they had no jurisdiction under that clause until the *rejection* by the Master of the claim had been entered by him on the minutes, and therefore dismissed the application, reserving to Anderson to go again before the Master and get the proof of his claim either expressly admitted or rejected. Instead of doing this, Anderson, who had on the 4th July obtained the following written consent of certain of the creditors: "We, the undersigned creditors, being the majority in number and value, who have proved debts under the above insolvent estate, do hereby authorize and empower Mr. G. H. Meyer, the sole trustee in the said insolvent estate, to consent to the admission to proof of the claim of 19,080rds. 5st., by and on the part of G. Anderson against the estate of his said deceased wife, A. Berrange, and also to such dividend as he may be entitled to in respect thereof. As witness our hands at Cape Town, this 4th July, 1835, Aletta Coffin, G. H. Meyer, R. P. Jones, G. H. Meyer,"—applied to the trustee by letter, dated 21st July, 1835, in respect of said consent, to admit his claim, and award him a dividend thereon. The trustee (as appeared from an affidavit sworn by him), in consequence of being so authorized by the majority of the creditors, and having previously, in conjunction with R. P. Jones, one of the creditors, examined the account-current between Anderson and his deceased wife, the insolvent, in respect of which his claim was made, together with the vouchers and documents in support thereof, and having found the same correct, with the exception of two items, one on the debtor and the other on the creditor side of the account (which being struck out thereof would have increased the balance due to Anderson by 122rds.), admitted the debt as claimed, and in the liquidation account awarded to Anderson a dividend thereon of £107 0s. 4½*d.*

It appeared from the minutes that at a meeting holden before, &c., on the 26th May, 1835, pursuant to advertisement in the *Government Gazette* of the 24th April last, for the proof of debts, for the purpose of receiving tenders for the sale of a piece of ground situate in Riebeek-street, near the Whale Fishery (the property of insolvent), and for the purpose of determining thereon, and giving the trustee directions concerning the same,—at this meeting

Mr. Anderson offered the sum of £205, and Mr. C. C. Dieleman offered a sum of £400. Whereupon it was resolved that the offer of Mr. C. C. Dieleman be accepted.

(Signed) C. C. DIELEMAN.

And it was resolved by the undersigned that the offer of Mr. Anderson be accepted.

(Signed) G. H. MEYER,
G. H. MEYER, for R. P. JONES,
G. H. MEYER, for A. COFFIN.

Before me, C. BURTON.

On the 23rd November, 1835, Carel Dieleman and the trustee of Antony Dieleman, the sons of Mrs. Anderson by her first marriage, caused a notice to be served on the trustee of her insolvent estate, calling on him to show cause, if any, 1st, why the claim of G. Anderson, amounting to £1,431 0s. 1½*d.*, filed in the estate, should not be rejected as not proved. 2nd, why the transfer of certain property, situate in Riebeek-street, near the Whale Fishery, &c., to the said G. Anderson, by G. H. Meyer, the trustee of the sale estate, should not be set aside and declared to be invalid, on the ground that at a meeting of the creditors of the said estate, held before the Master upon the 26th May, 1835, called for the purpose of receiving tenders for the sale of the said property, and for determining thereon, the sum of £400 was offered by C. C. Dieleman, and which he is still willing to pay, if necessary, whereby the interests of the parties concerned in the estate have been injured, the said C. C. Dieleman being a creditor, and, together with his brother A. Dieleman, joint heir of the estate of the said A. Berrange.

It appeared from the affidavit of the trustee "that the said Carel Dieleman is not a creditor under the said insolvent estate, he not having produced any debt thereon."

This day, after hearing the Counsel for the parties,

The Court overruled the second objection, in respect of which it was sought that the transfer and sale of the landed property should be declared invalid, for the following reason among others, that Carel Dieleman not being a creditor who had proved a debt against the estate, had no title to object to the sale, and that the claim of G. Anderson be struck out from the account at present, and that the said G. Anderson be referred to the Master to prove his claim, and that the costs between the said parties be compensated.

1835. Nov. 28.

In re Anderson. —Dieleman vs. Anderson.

The Court held that the trustee had no power to admit the debt, and therefore that it must be struck out at present, as having been admitted by an incompetent person, but reserving right to Anderson to proceed before the Master. (*Vide Anderson* vs. *Meyer and Barnard*, 11*th August*, 1836, *vol.* 1, *p.* 204.)

The Court expressed an opinion that when the Master had not sufficient proof before him to induce him to admit the debt, he ought to record expressly that it was rejected, instead of merely entering it short.

Steytler, Trustee of Bam, *vs.* Rens.

Damages, action of, for detention of property belonging to an insolvent estate, by an alleged creditor, whose claim the Court found, however, to be of no legal effect.

[For the other branch of this case, see Vol. II, Part 2 p. 3.]

1836. May 6

Steytler, Trustee of Bam, vs. Rens.

Bam's trustee brought an action to recover damages against Rens, the declaration in which set forth that the defendant, on or about the 10th December, 1834, possessed himself of a covered wagon, eight wagon horses, and a set of harness for eight horses (those were the wagon, bay horses, and harness mentioned in the notarial deeds of the 19th March and 29th July, 1834, set forth in the above cited branch case of *Rens* vs. *Steytler, Trustee of Bam*), belonging to the estate of Bam, and unlawfully retained the possession up to the 28th May, 1835, and during the said period from 10th December, 1834, to 28th May, 1835, unlawfully made use, or allowed others to make use of said wagon, horses, and harness, to the detriment of the estate and creditors of said Bam, whereby the estate has suffered damage to the amount of £169, being at the rate of £1 per diem during the said period.

The defendant pleaded the general issue, and as a further plea pleaded a tender of £25.

After evidence, which supported the averments of the declaration,

Cloete, for the defendant, contended that judgment ought to be given for defendant, in respect that under and by virtue of the contract of the 29th July, 1834, the possession and use which he had of the wagon and horses during the period alleged was not illegal, but that which he was entitled to have and enjoy.

2ndly,—That even if the Court should decide otherwise, the sum tendered was sufficient to repair any damage suffered by the estate by the illegal possession and use of the wagon and horses had by defendant, and therefore that judgment ought not to be given for plaintiff for more than the sum tendered, and with costs to the defendant.

Judgment for Plaintiff for £43 10*s.*, and costs.

The Court held that, the contract of 29th July was not a *bonâ fide* contract of sale, and therefore that defendant could not maintain his right to the possession and use of the wagon and horses under the title of a *bonâ fide* purchase; that even admitting that this contract was not liable to be set aside as null and void on the ground of usury (a point on which they gave no opinion), and that the defendant was, in virtue of that contract, entitled to be considered as a lawful creditor of Bam, having and holding the wagon and horses, the subject of this action, in his possession, as a lawful pledge—(they gave no opinion as to the legal character and effect of the proceedings, by which defendant obtained possession of the wagon and horses),—still that, as such creditor, he had no right to retain possession of, or to use them for a single day after the sequestration, but ought to have sought his remedy under the 37th section of the Insolvent Ordinance, No. 64, and given up the possession to the trustee; consequently, that he was liable for any loss or damage which had been caused to the estate by his detention of the same; that, under all the circumstances of the case, the Court could not estimate the value of the wagon and horses at the date of the sequestration at less than £90, which, after deducting the 620rds. for which the trustee had sold the property, left a balance to be made good to the estate by the defendant of £43 10*s.*

In re Wolff & Bartman.

May 19.

The Colonial Government held to be preferent on the insolvent estates of auctioneers for the amount of the Government auction dues received by them and not duly paid.

[Vol. I, p. 322.]

In re the Partnership Estate of Wolff & Bartman.

Joint and Separate Estates.

1836. Nov. 22.

W. and B., partners in business as auctioneers, took out individual licences as auctioneers, and afterwards surrendered both partnership and private estates. Government was ranked preferently on the separate estate of B., for auction dues on sales held by him under his individual licence. The separate estate being insufficient, the Government claimed preference on the partnership estate. The trustees rejected the claim as not being for a partnership debt. The sureties for B.'s separate estate appealed to the Court, which upheld the decision of the trustee.

[Vol. II, Part 1, p. 36.]

In re Neethling.

Purchase of insolvent assets by sole trustee allowed under peculiar circumstances, he being a mortgage creditor, and the other creditors adopting the sale, and consenting that the purchase price should go in diminution of his bond.

But no strykgeld (bonus) allowed to the trustee on his purchase quâ creditor.

1837. Feb. 1.

In re Neethling.

The real property in the insolvent estate of Briel was duly put up by the trustee for public sale by auction in terms of a resolution duly passed at the third meeting of the creditors, confirmed by the Court on the report of the Master. At this sale Michiel C. A. Neethling, the sole trustee of the insolvent estate, became the purchaser.

On the 8th of October, 1835, the Master reported the sale and the particular circumstances attending the sale, but did not pray for the confirmation thereof, in consequence of the proceedings being informal for the reasons therein particularly referred to. Whereupon the confirmation of the sale was stayed by the Court.

On the 26th of August last, a meeting of creditors was held before the Resident Magistrate of Stellenbosch, pursuant to advertisement in the *Government Gazette*, for the purpose of determining whether the said property, which has been appraised at 11,000 guilders, shall be taken

over by and transferred to M. C. A. Neethling, as last mortgagee of the said property, for the sum of 12,000*f.* Whereupon it was resolved by the whole of the creditors present at the said meeting, that Mr. Neethling be allowed to take over the premises accordingly.

1837. Feb. 1. *In re* Neethling.

On the 12th October, 1836, the Court was moved by Mr. Hofmeyr, on behalf of the trustees, for leave to have this resolution confirmed, and the transfer ordered to be effected, but the Court saw reason to direct this application to be made through the Master, who thereafter reported, "That it has been made to appear to me, in addition to the resolution passed at the last-mentioned meeting of creditors, that the consent of all the mortgagees, and of nearly the whole of the creditors, has been obtained, allowing the said M. C. A. Neethling to become the purchaser of the said property on the said terms. And the said M. C. A. Neethling, having made an affidavit, states that the property aforesaid was purchased by him at the sale in ignorance of the law and without collusion. I have to pray that under these circumstances the Court may be pleased to confirm the sale."

The Court, under the circumstances of this case, confirmed the sale, notwithstanding that the trustee had been the purchaser, but directed the Master, in examining the trustees' accounts, to disallow the *strykgeld*, which had been paid to the trustee as having been the highest bidder.

See the proclamation of the 3rd September, 1813.*

[*NOTE.—And Public. 27th December, 1805. *Cons.*, also, *Matth. de Auct.*, 1, 10, *nn.* 4 *and* 5; *Burge Confl. of Laws*, *vol.* 2, *p.* 459, *seqq.*, and as to the English law, 1 *White and Tudor, Leading Equity Cases*, *p.* 107; *Lewin on Trusts'* *p.* 367.]

IN RE ZEYLER *vs.* MULLER.

Rehabilitation.

Can a creditor, who has not filed his claim before the final liquidation and distribution, oppose the insolvent's rehabilitation?

Zeyler's estate was placed under sequestration on the 6th March, 1827.

Oct. 12. *In re* Zeyler *vs.* Muller.

The liquidation account was confirmed by the Supreme Court in 1829, and the estate distributed.

Zeyler this day applied for his rehabilitation, and the Master reported that all the provisions of the late Sequestrator's Ordinance had been complied with.

1837.
Oct. 12.

In re Zeyler *vs.* Muller.

Muller now applied to be allowed to file in the estate two debts alleged to have been due by Zeyler to his (Zeyler's) father, and purchased by Muller from the trustee in the insolvent estate of the said father, in order that thereafter he may oppose the application for rehabilitation.

No claim had ever been made by the father or his trustee on those alleged debts, in the proceedings under the sequestration of Zeyler's estate.

The Court refused the application with costs, on the ground that the insolvent estate having been finally liquidated and distributed, there was now no estate under sequestration in which any claims could be filed,—and that it was competent for the applicant, without filing his claims against the insolvent, as under the sequestration, to take proceedings for the recovery of the debts alleged by him to be due by the insolvent to him, or to state any objection to the insolvent's rehabilitation which it was competent to state in virtue of any debts upon which no claims had been filed under the sequestration, before the final liquidation and distribution of the estate.

Cloete, for the insolvent, then applied for his rehabilitation.

Brand, for Muller, as a creditor in virtue of the two claims above mentioned, opposed it.

The Court, not wishing without a full bench to decide the question, whether a creditor who had not filed his claims before the final liquidation and distribution could object to rehabilitation, or whether the act of rehabilitation had any effect except against creditors who had filed claims under the sequestration, granted the rehabilitation, with this restriction,—that the right of Muller to recover from the insolvent payment of any of the said debts shall not be prejudiced by these presents.

[*Vide Witham, q.q. La Foret*, vs. *Nourse*, 30*th September*, 1830, *vol.* 1. *p.* 485; *Theunissen* vs. *Volkwyn*, 1*st December*, 1832, *ante p.* 211; *and De Vos* vs. *Brink*, 23*rd November*, 1837, *next case.*]

De Vos *vs.* Andries Brink.

Rehabilitation did not bar the claim of a creditor who had not proved under the sequestration. But under Ordinance 6 *of* 1843, § 120, *it does.*

Nov. 23.
Dec. 12.

De Vos *vs.* Andries Brink.

The declaration in this case set forth the facts stated in the declaration in the case of the executors of *Hoets* vs. *De Vos* (the present plaintiff), 24th August, 1837, and also the

judgment obtained by the said executors in that case against the present plaintiff, and alleged that the plaintiff paid and satisfied to them the amount of the said judgment, whereupon the said executors duly ceded and transferred all their right, title, and interest to the said bond of the 5th January, 1821, passed by the present defendant in favour of Arend Brink, to and in favour of the plaintiff, who thereby became entitled to have and demand payment thereof from the said defendant, as principal debtor in the said bond of the 5th January, 1821.

In his plea, the defendant admitted all the facts alleged in the plaintiff's declaration, but alleged that on the 28th September, 1826, the defendant surrendered his estate as insolvent, and that the same was entered upon and duly administered by the late Sequestrator.

That by order of this Court, bearing date the 29th day of August, 1833, the said defendant was duly rehabilitated from his state of insolvency, and released from all debts contracted by him prior to his insolvency, and which were proved or provable in his said insolvent estate.

And the said defendant lastly saith that the said bond was so provable in his insolvent estate, and that by reason thereof he is discharged by law from the payment of the sum now demanded.

This day, *Brand*, for the plaintiff, quoted *l.* 2, *Cod.* 7, 56, *l.* 63; *Dig.* 42, *t.* 1; *Tredoux* vs. *van Dyk*, 29*th August*, 1821; *Dray* vs. *Taylor*, 13*th May*, 1824, and maintained that, as in this case, the debt sued for did not become due by defendant to plaintiff until subsequent to defendant's rehabilitation, and consequently was a debt which could not have been claimed on under the sequestration, it therefore could not be affected by the rehabilitation, and referred to the Ordinance regulating the sequestration of insolvent estates at Amsterdam, 41st and 30th sections, which he contrasted with the 53rd, 54th, and 40th sections of the instructions for the Sequestrator in this Colony. (*Voet*, 2, 14, § 14; *Voet*, 46, 1 § 31.) He also maintained that the plaintiff had paid the bond *nomine fide jussoris*, and that, therefore, without and independent of the cession of the bond, he had a right of action against defendant, and quoted the clause in the bond in the usual form binding the defendant to relieve his sureties.

Cloete, contra, quoted *Pothier, vol.* 1, *p.* 10, to show that the order of rehabilitation was not a mere judicial judgment, but a proceeding provided by legislative enactment; *The Sequestrator's Instructions*, 40*th section*; *Voet*, 46, 1, 34; *Van Leeuwen's Rom. Dutch Law*, 4, 4, § 17.

Cur. adv. vult.

1837. Nov. 23. Dec. 12. De Vos vs. Andries Brink.

Postea (12th December, 1837).—The Court held that rehabilitation did not bar the claim of a creditor who had not claimed under the sequestration, and gave judgment for plaintiff as prayed (excepting interest) with costs.

Vide Zeyler vs. *Muller*, 12th October, 1837 (*ante*).

Executors of Hoets *vs.* De Vos.

Aug. 24. Sept. 8.

Arend B. passed a bond, January, 1826, *for* £150 *to J. H., and as security ceded and delivered in pledge a bond dated January,* 1821, *by Andries B. for* £175, *with defendant as surety and co-principal debtor. Arend B. surrendered. The* £150 *bond was proved in his estate and the* £175 *bond, ceded by his trustees to H., was now proceeded on to the extent of* £150. *De V. claimed a discharge on the ground that the* £175 *bond had not been proved on the estate of Andries B., who had surrendered September,* 1826, *and been rehabilitated June,* 1833; *but the Court gave for plaintiffs with costs.*

[Vol. II, Part I, p. 53.]

In re Liesching.

Nov. 28. 1838. Feb. 20. „ 27.

A and B were guardians of a minor, B being the administering guardian. A granted a mortgage bond specially hypothecating certain property to B as administering guardian, which bond was, on B's departure from the Colony, delivered as an asset of the minor's estate to C, who had been constituted administering guardian. A having become insolvent, the question arose whether, for the amount of this bond, there was a preference by virtue of the legalis hypothec tutelæ on the insolvent estate, taking preference of special mortgages prior to the mortgage in question. The Court held that the estate of A was not subject to any tutorial hypothec until after excussion of the administering guardian duly constituted, and then for the balance not recoverable from him: that the mortgage bond passed for the debt in favour of the administering guardian was therefore to be postponed in order of preference to the special hypothec of anterior date.

[Vol. II, Part 2, p, 329.]

IN RE CARTER,—LEIBBRANDT AND GEYER *vs.* DICKSON AND BURNIES.

1838. Dec. 19.

Preference in insolvency. Bond for future advances. Liquidation account, amendment of. Registration. Stamp on bond.

A bond for uncertain amounts to be advanced in future, and containing a special and general mortgage, is a valid bond, in preference, if duly registered.

Where a bond for £500 *already advanced on security of a special and general mortgage, and for future uncertain advances was registered as a special bond for* £500, *without any mention in the registry of the future advances or of the general clause; held that as no particular form of registry is prescribed by law, such registration is sufficient; although it is at the same time very desirable that regulations should be framed for the more specific registration of such bonds in future.*

Where such bond was stamped originally for £500, *no objection to the bond can be taken on this ground, the stamp law making no provision for stamps on bonds for uncertain amounts.*

Per MENZIES, J.:—*Non-registration, or a wrong registration, where it is the fault of the Registrar of Deeds, founds an action of damages against him, but deprives the creditor of preference.*

[Vol. II, Part 3, p. 345.]

IN RE LIESCHING.—VAN DER RIET AND DE SMIDT *vs.* TENNANT AND COMPANY.

Ordinance No. 64, § 7.

Mortgage. Delivery.

Movables. Hypothecation of. Consignment.

Bond granted by an insolvent partly in security for antecedent debts, partly for fresh advances, set aside as an undue preference in so far as affected the antecedent

debts, but sustained as a valid security for the fresh advances.

L. surrendered his estate on the 26th November, 1834. *On the 18th August,* 1834, *when he was irretrievably insolvent, according to the finding of the Court, he executed a deed of assignment in favour of T. & Co., to whom he owed* £2,750 *for goods sold and moneys lent and advanced, and for bills accepted by them on the 12th August,* 1834. *In his deed he bound himself to pay them that sum at a short date, and as security for such payment, specially hypothecated to them certain merchandise which he had shipped to the eastward on consignment, certain bills of lading, policies of insurance, and securities or their proceeds, if realized, adding a clause of general hypothecation of person and property. The bills of lading and other securities referred to were either handed over to T. & Co. at the date of the deed of assignment, or forwarded by L. to the consignees. L. on the 15th August,* 1834, *addressed a circular letter to the consignees, stating that as T. & Co. had made advances to him on the consignments, the proceeds in cash or return cargoes should be forwarded to them. Some of the consignees sent return cargoes which L., before his insolvency, and his trustees after it, handed over to T. & Co., others remitted cash, others bills of exchange. In this way,* £1,750 *out of the* £2,750 *was realized by T. & Co. L.'s trustees, in their distribution account, awarded a further preference to T. & Co., in part payment of their debt. This preference being disputed by the creditors, the Court directed an action to be brought by the objecting creditors for the purpose of settling the rights of parties; when it was* HELD *that the bond, in as far as it was given as security for debts antecedently contracted, was bad; L. being at the date of its execution, and then knowing himself to be insolvent; but that, in so far as it was given for the new debt in the shape of the advances made by T. & Co. at its date, it had not the effect of preferring one creditor over another, and was, therefore, valid as a general mortgage. That the deed was bad as a special mortgage, without delivery, actual or equivalent, of the goods or securities, before the sequestration, and even with such delivery was bad after the sequestration. That on the receipt of the circulars by the consignees before the sequestration was sufficient delivery to vest the dominium in them, and entitle them to forward the proceeds to or for T. & Co. The Court, on these principles, found generally for the defendants.*

1838.
Feb. 28.
June 29.
Aug. 7.

In re Liesching.
Van der Riet
and De Smidt
vs. Tennant & Co.

The estate of W. A. J. Liesching was surrendered by him as insolvent, and placed under sequestration on the 26th November, 1834. In the distribution account thereof, afterwards framed by the trustees, a preference was awarded to Tennant & Co., the defendants, on certain assets of the estate, in part payment of their claim of £2,750. This preference having been objected to by the plaintiffs, creditors on the estate, whose interest was prejudiced thereby, it was ordered by the Court, on the 28th February, 1837, that for the more convenient decision of the questions at issue between the parties, the objecting creditors should, as plaintiffs, declare against Tennant & Co., as defendants.

The plaintiffs' declaration set forth that the plaintiff Van der Riet, was a creditor on the insolvent estate for £1,000, by virtue of a mortgage bond, dated 3rd May, 1831, specially mortgaging certain landed property at Green Point. That the net proceeds of the sale of this property, after deduction of the amount of a prior special mortgage thereon, was £921 17*s.* 6*d.*, whereof the trustees have awarded in preference on the claims of certain minors, whose tutor the insolvent had been, in virtue of their tacit legal tutorial hypothec, a sum of £448 7*s.* 8½*d.*, and have only awarded to the said Van der Riet the balance of £473 9*s.* 9¾*d.*, leaving a deficiency of £448 7*s.* 8¼*d.*, still due and unsatisfied to the said plaintiff.

That the plaintiff De Smidt was a creditor on the insolvent estate for a sum of £1,125, by virtue of a notarial bond, executed by the insolvent on the 8th July, and duly registered on the 29th July, 1826, containing a general mortgage upon the insolvent's estate, of which bond the said plaintiff became the legal holder by cession on the 30th March, 1827, and that nothing had been awarded to the said plaintiff from the insolvent estate on his said debt, the whole amount whereof remains due and owing to him.

That the defendants are creditors under the said insolvent estate for £2,750 with interest, being for goods sold and delivered, and for moneys lent and advanced, as also for certain bills of exchange, drawn by the insolvent upon and accepted by the said defendants, as more fully appears by a notarial deed passed by the insolvent on the 18th August, 1834, and duly registered on the 19th August, 1834, as a security for the due payment whereof the said insolvent did, by the said notarial deed, by way of special mortgage, pledge, hypothecate, or otherwise bargain, assign, transfer, and set over to the said defendants all his right, title, interest, claim, property, and demand in and to certain goods, wares, and merchandises and remittances, as described and set forth in the said notarial deed.

1838.
Feb. 23.
June 29.
Aug. 7.

In re Liesching. Van der Riet and De Smidt vs. Tennant & Co.

That the proceeds of the said goods, &c., have realized, after deducting the costs of sequestration, a net sum of £1,704 15*s.* 3¼*d.*, available in the said insolvent estate for distribution, and which amount the said trustees have awarded by preference to the defendants, in part payment of their claim of £2,750.

That the said trustees have unlawfully and illegally awarded such preference upon the said sum of £1,704 15*s.* 3¼*d.*, because the alienation, transfer, cession, delivery, mortgage, pledge, or hypothecation which was made or constituted by the said notarial bond as aforesaid is in law ineffectual, null, and void, by reason of the said insolvent having made or constituted the same when he was not compelled by legal process to make the same, and when he knew himself to be insolvent, and such alienation or mortgage as aforesaid having the effect to prefer one creditor to another, and also by reason of the said alienation, &c., as aforesaid, having been constituted of movable property, unaccompanied by delivery,—or if any delivery has been made, such delivery having been made or taken effect within sixty days preceding the making of the order of sequestration of the said insolvent estate, whereby the said alienation, &c., as aforesaid became and was null and void and of no effect, to set aside the right of preference of the plaintiff in the said estate.

And the said plaintiffs further say that upon the said alienation, &c., being declared null and void and ineffectual as aforesaid, the sum of £1,704 15*s.* 3¼*d.* should by law first be laid out and expended towards paying the tacit legal mortgage in favour of the minors aforesaid, and the balance thereof then be awarded to the general mortgagees upon the estate, according to the seniority of registration, whereby £448 7*s.* 8¼*d.*, which the trustees have taken from the proceeds of the landed property specially mortgaged as before mentioned to the said Van der Riet, and awarded to the said minors as tacit legal mortgagees, would become due and payable to the said Van der Riet on his aforesaid claim and special mortgage.

And the said Van der Riet for himself further saith that even in case this Court shall consider and adjudge the said transfer, &c., made to the said defendants as aforesaid, to be valid and effectual, and that the said defendants are entitled to the preference as awarded to them, that yet, in so far as the unmortgaged property found in the said insolvent estate was found insufficient to pay the claims of the said minors as tacit legal mortgagees, the said trustees were bound and obliged to take or recover such deficiency from the proceeds of the several special mortgagees alike,

and *pro rata parte*, proportionably to the respective amounts of their several claims, for the purpose of making up such deficiency of the tacit legal mortgagees, which the said Van der Riet saith the trustees have not done, but that they have, for the purpose aforesaid, taken from the proceeds of the landed property, specially mortgaged to the said Van der Riet, the sum of £448 7*s.* 8½*d.*, and have taken nothing from the amount awarded to the said defendants, although the special mortgage of the said Tennant & Co. is of a date posterior to that of the said Van der Riet.

Wherefore the plaintiffs prayed that the preference awarded to Tennant & Co. should be set aside, and that the liquidation account should be amended accordingly.

In their plea, the defendants stated that the deed of assignment in the declaration mentioned, dated the 18th August, 1834, was executed for a good and valuable consideration, to wit, for securing the payment to the said defendant of the sum of £2,750 with interest, being a just debt before that time due and owing to the said defendant, for goods sold and delivered, and moneys lent and advanced to the said insolvent, and on account of divers bills of exchange, which the said defendants had accepted for the benefit of the said insolvent, and at his special instance and request.

That the said deed of assignment was so executed by the said insolvent at the urgent request of the said defendants, and that the said insolvent did, at the time of the execution of the same, duly transfer to the said defendants the policy of insurance, bills of lading, and all other papers and documents connected with the goods, wares and merchandises, securities and assets, cash and remittances, in the said deed of assignment and schedules thereunto annexed respectively mentioned and described, and otherwise wholly divest himself of all power and control over the said goods, &c., by means whereof the possession of the said goods, &c., was completely delivered to the said defendants, in point of law, at the time of the assignment of the same as aforesaid.

And further stated that when the said insolvent so executed the said deed of assignment for a good and valuable consideration, he did not know himself to be insolvent, or contemplate surrendering his estate as insolvent, or know that legal proceedings for obtaining an order for sequestration of his estate as insolvent had been commenced, and that the said insolvent executed the said deed of assignment, a considerable time, to wit, more than sixty days preceding the making of any order for sequestration of his estate as insolvent,—and that the said deed of assignment had not the effect of unlawfully preferring one

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creditor to another. And the said defendants admit the truth of the facts alleged in the said declaration, except in so far as the same are herein and hereby denied and avoided. Wherefore the defendants prayed that the preference awarded to them by the trustees, in respect of the said deed of assignment, should be allowed and confirmed with costs.

At the trial, the evidence of the witnesses called by the plaintiffs (corroborated by a witness for the defendant) proved that on and previous to the 18th August, 1834, William Liesching was irretrievably insolvent, his debts then amounting to between £17,000 and £18,000, and his assets, estimating them at the highest probable value, amounting only to between £7.000 and £8,000, and also proved to the conviction of the Court that on and previous to that date, Liesching knew that his estate was irretrievably insolvent.

The deed of assignment in favour of the defendants was put in, and was to the effect following: "On the 18th August, 1834, before me, J. Barker, notary public, &c., personally came and appeared W. A. J. Liesching, &c., who declared that whereas he has at different times shipped in the ships or vessels called," &c. (here a list of eleven vessels was given), "divers goods, wares, and merchandises consigned to Messrs. Rowlandson, Wicks, & Co., of the Mauritius, Messrs. White, Clarke, & Co., of Colombo, Wm. Wilson, of Hobart Town, Messrs. Hewitt, Gore, & Co., of the same place, C. S. de Villiers, of Launceston, Alfred Waylen, of Swan River, and G. F. Johnson, of the same place, the particulars, whereof are specified in the schedule hereunto annexed, marked A; and whereas the appearer is justly and truly indebted unto T. Tennant & Co., &c., &c., in the sum of £248 15*s.* 11*d.*, for goods sold and delivered, and also for cash lent and advanced by them to the appearer, according to the account hereunto annexed marked B; and whereas he, the appearer, hath directed the said," &c. &c. (here followed the names of the above-mentioned consignees), "to invest and remit the proceeds of the goods, &c., so shipped by him to the Mauritius, Colombo, Hobart Town, Launceston, and Swan River, as aforesaid, to the said T. Tennant & Co., in return produce, or otherwise, as they the said T. Tennant & Co., shall direct; and whereas he, the appearer, hath effected an insurance for the sum of £900 on the shipment per *Quebec Trader* as aforesaid; and whereas the said T. Tennant & Co. have, at the special instance and request of the appearer, accepted bills of exchange, drawn by him upon them, for the sum of £2,501 4*s.* 1*d.*, as after mentioned" (here followed a list and specification of the said acceptances):

"Now the appearer acknowledging the justice and correctness of the account for goods sold and delivered, and also for cash lent and advanced, marked B, and the receipt of the said several acceptances, amounting together to the said sum of £2,501 4*s.* 1*d.*, and renouncing the exception, &c., did declare to have engaged and bound, as by these presents he doth engage and bind himself, to the said T. Tennant & Co., to the effect following, to wit: That on or before the 11th August, 1835, he the appearer will pay or cause to be paid to the said T. Tennant & Co., &c., &c. 1st, the said sum of £2⅛8 15*s.* 11*d.* with interest, &c. 2nd, the sum of £2,501 4*s.* 1d., the amount of the said acceptances with interest, &c., from the days the said acceptances severally become due to the day of payment. And as a security for the due payment of the said sums and interest, he, the appearer, doth hereby bargain, assign, transfer, and set over to the said T. Tennant & Co., &c., by way of special mortgage, pledge, hypothecation, or otherwise, all the right, title, interest, claim, property, and demand of him the appearer in and to the goods, &c., so shipped by him in the vessels," &c. (here followed a list of the eleven ships before mentioned), "as also the securities and assets specified in the said schedule or inventory marked A, and the proceeds thereof not already come to hand, and any return cargo or cargoes in which the said proceeds may be invested, and also in and to the policy of insurance which has been effected for the sum of £900 as aforesaid, as also in and to all the goods, &c., &c., belonging to him the appearer, which now are or may be in the custody or possession of the said A. Waylen, or for which he is responsible, and which are not specifically mentioned in the said schedule or inventory marked A, as also in and to all cash and other remittances which may at any time hereafter be transmitted to the appearer on account of any of the hereinbefore mentioned consignments. The appearer hereby engaging and binding himself, immediately on receipt thereof, to pay, indorse, and hand over to the said T. Tennant & Co., all such cash and other remittances as last aforesaid. And as a further security for the payment aforesaid, he doth hereby mortgage, pledge, and hypothecate his slaves, viz:" (here followed a list of them), "and generally his person and property, of whatever description, &c., &c. Submitting the same to constraint and execution as law directs."

The plaintiffs admitted that the bills of exchange mentioned in the said deed, all of which were dated 12th August, 1834, had been accepted by the defendants as therein stated, and immediately thereon delivered to Liesching.

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The defendants called John Barker, notary public, who stated: I am the attorney of the defendants. About the 11th or 12th of August, 1834, I received from the defendants instructions to prepare the deed of assignation, dated the 18th August, 1834. I went to Mr. Liesching next day to get a schedule of the property to be assigned, and either he or the defendants handed over to me the bills of lading, which I now produce, and which are of the goods, &c., shipped by six of the vessels specified in the deed. I did not receive the full sets of each of those bills, only those I produce. I believe the others of each set had been previously forwarded to the consignees. I did not receive the bills of lading of the goods shipped by the other vessels mentioned in the deed. I understood they had been forwarded to the consignees. I received the policy of insurance on the shipment by the *Quebec Trader*, and the bond of Waylen in favour of Liesching, mentioned in the schedule.

The defendants put in a paper of admission signed by the plaintiffs' attorney, admitting "that the late W. A. J. Liesching did, on or about the 15th August, 1834, write and address circular letters to the following effect:—

"DEAR SIRS,—Messrs. T. Tennant & Co., of this place, having made me advances on shipments made by me to your consignment, I have to request that you will remit the proceeds of [all] sales effected by you on my account [together with the amount of any other property coming into your hand belonging to me] to the said Messrs. T. Tennant & Co., or their order, for which this shall be deemed sufficient authority, and oblige,

"Dear Sir,
"Your obedient Servant,
"W. LIESCHING."

(N.B.—The words between brackets were inserted only in the circulars addressed to Messrs. Hewitt, Gore, & Co., of Hobart Town and Launceston).

to some of the consignees of the cargo specified in the deed of the 18th August, 1834, and that the defendants transmitted these circulars to Mr. C. J. de Villiers, of Launceston, Messrs. White, Clarke, & Co., of Ceylon, Messrs. Hewitt, Gore, & Co., of Hobart Town, and to the said house at Launceston within the said month of August, and to Alfred Waylen, of Swan River, on or about the 20th October, 1834, and further admitting the arrival of the said circulars, and their receipt by the above

parties within sixty days preceding the making of the order for sequestration of Liesching's estate as insolvent, except the one to Mr. Waylen, which could not have reached him until after Liesching's surrender on the 26th November, 1834.

It was proved by the accounts and letters which were put in, and admitted, that the sum of £1,704 15*s.* 3½*d.*, in dispute between the plaintiffs and defendants was composed:

1st. Of the net proceeds of sugars consigned to Liesching in the *Malvina* from the Mauritius, by Rowlandson, Wicks, & Co., as being the return produce of certain of the goods mentioned in the deed of 18th August, 1834, as having been consigned by Liesching to that firm, and which had been delivered over to the defendant by Liesching on the 2nd November, 1834, before his sequestration, amounting to ... £122 5 2½

2nd. Of the proceeds of four bills of exchange which had been remitted to Liesching by some of the consignees of the goods mentioned in the deed of 13th August, 1834, in payment of the proceeds thereof, before the circulars of the 15th August, 1834, had been received by them, and which bills had been handed over to the defendants by Liesching on the 9th October and 22nd November, 1834, before his sequestration, amounting to 700 0 0

3rd. Of the proceeds of a bill which had been remitted by Hewitt, Gore & Co., to Liesching, before receiving the circular, had been received by his trustees, and by them on the 19th December, 1834, handed over to the defendants, amounting to ... 46 16 7

4th. Of the proceeds of two bills, which had been remitted by White, Clarke, & Co., of Ceylon, after they had received, and in obedience to the circular directly to the defendants, and had reached them on the 14th July, 1835, amounting to 76 16 1½

5th. Of the proceeds of two bills, which had been remitted by Dawes, Gore & Co., of Sydney, directly to the defendants in two letters, dated respectively 27th February and 4th May, 1835, which stated that these bills were remitted on account of Mr. W.

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Liesching, and which bills reached the defendants respectively on the 15th May and 31st July, 1835, amounting to ... £480 0 0

6th. Of the proceeds of two bills remitted by A. Waylen, directly to the defendants, in a letter dated 29th January, and which reached him on the 24th March, 1835, stating that the remittance was made in accordance with instructions received from Mr. Liesching, and requesting that the same should be placed to his credit, amounting to 150 0 0

7th. Of the proceeds of two bills remitted by J. Lamb & Co., of Sydney, to the insolvent in a letter dated 30th September, 1834, which came into the hands of his trustees, and were by them handed over to the defendants on the 2nd March, 1835, amounting to 154 0 0

Total £1,729 17 10½

Brand, for the plaintiffs, maintained that no effectual absolute assignment of the property specified in the bond in payment of the defendant's debt is created by the bond; at most, it is but a mere hypothecation of the property therein mentioned, as a security for the debts due by him to defendant. That neither the delivery of the bills of lading, nor the writing and receipt of the circular letters, constituted such delivery as is required by law to render effectual hypothecations of movables. That the circulars were not cessions, but merely mandates or orders, and that in virtue of those circulars, the defendants could not have maintained an action against the consignees for delivery to him either of the goods consigned or of their proceeds, and that the bills of lading were not endorsed by Liesching in favour of the defendants.

He also maintained that, even supposing the defendant had a valid special mortgage, still that he must be burdened *pro rata* with the amount of debts due to the tacit mortgages, which are preferent to all special mortgages, and that the amount of those tacit mortgages ought to have been paid, not solely out of the proceeds of the landed property specially mortgaged, but *pro rata* out of the proceeds of all the special mortgages.

Musgrave, contra, quoted *Smith's Commercial Law*, 356; *Harrison's Digest, p.* 2,031; 2 *T. Reports*, 485.

Cur. adv. vult.

Postea (29th June, 1838).—The Court gave judgment for the defendants in respect of the first four of the above-mentioned items amounting to £645 17*s.* 10½*d.*, being the proceeds of the goods, assigned in security in the deed of 18th August, 1834, which Liesching had himself received from the consignees, and handed over to the defendants before the sequestration of his estate, or proceeds of such goods as aforesaid which had been remitted by consignees who had, previously to the date of the sequestration, received Liesching's circular letter of the 15th August, 1834, directing them to remit the proceeds in their hands to the defendants, and who had, before receiving the circular, remitted such proceeds to the insolvent, and after receiving it remitted the same to the defendants; and *quoad ultra* as to the other three items, reserved the case for further hearing and consideration.

Postea (7th August, 1838).—This day the Counsel for the plaintiffs admitted as to the fifth item that the whole of the goods which are stated in the deed of assignment to have been shipped in the *Cornwallis*, and consigned by the insolvent to Messrs. Hewitt, Gore, & Co., of Hobart Town, were by them forwarded in the said vessel to the firm of Messrs. Dawes, Gore, & Co., of Sydney. That Dawes, Gore, & Co. sold the said goods, and remitted to the defendant on account thereof the two bills of exchange for £180 and £300, constituting the fifth item above mentioned; and, further, that the persons trading under the firm of Messrs. Dawes, Gore, & Co., of Sydney, were the very same persons trading under the firm of Messrs. Hewitt, Gore, & Co., at Hobart Town.

The Court held that, notwithstanding the transmission of the goods per *Cornwallis* to Messrs. Dawes, Gore, & Co., at Sydney, they must be considered (without reference to the identity of the persons trading under the two firms) as, in a question with the consignor and those deriving right through him, to be still in the legal possession and under the control, and at the disposition of Messrs. Hewitt, Gore, & Co., the original consignees, and, consequently, that those goods and their proceeds were to be considered in the same situation with those which had been sold, and their proceeds remitted directly by Messrs. Hewitt, Gore, & Co. And this without the least regard to the fact proved by the defendants, viz., that the defendants had addressed to Dawes, Gore, & Co., a letter dated 15th August, 1834, stating the difficulties into which the insolvent had fallen,—the assistance rendered to him by the defendants,—the security, given them by the insolvent, that the circular letter had

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been forwarded to Hewitt, Gore, & Co.,—and concluding thus: "We are not aware whether or no you have anything in hand belonging to W. Liesching, but in the event of your being indebted to him, be pleased to remit the same to our control."

It was also admitted by plaintiffs as to the sixth item, that the bond, dated 27th April, 1833, by A. Waylen, in favour of the insolvent, specified in the schedule annexed to the deed of assignation as part of the property assigned by the insolvent in security to the defendant, had been regularly ceded and transferred, and the bond itself delivered over to defendant at the date of the assignation, or at least long before the date of the sequestration, and that the defendants were entitled to apply the two remittances of £100 and £50, made by Waylen to, and received by defendant on the 24th March, 1835, constituting the sixth item above mentioned, to the discharge of this bond, and were consequently entitled to retain the same.

Having made these admissions, the plaintiffs made no opposition to judgment being given for defendants as to the whole sums in dispute, without any exception as to the two treasury bills of £54 and £100, constituting the 7th item above mentioned, remitted by John Lamb & Co., of Sydney, received by the insolvent's trustees, and delivered by them to defendant on the 2nd March, 1835.

The Court therefore gave judgment in favour of defendants for the whole sums in dispute, with costs.

This judgment did not decide any principle whatever as to the said two last-mentioned treasury bills, with regard to the particular circumstances attending the remittance of which, or the source from which they proceeded, the Court had no sufficient information, although it may be presumed that the plaintiffs knew that these bills were in the same situation as those remitted by Messrs. Dawes, Gore, & Co.

Before the judgment was given, the plaintiff Van der Riet had ceased to have any interest in the suit, unincumbered funds having come into the hands of the trustees, applicable to the payment of the debt due to the minors by virtue of their tacit legal hypothec, by which means the trustees were enabled to award to Van der Riet the £448 7*s.* 8½*d.*, that portion of the net proceeds of the landed property specially mortgaged to him, which the trustees had provisionally employed in the payment of the said tacit legal hypothec.

It became therefore unnecessary to give any decision on the question raised by Van der Riet in the declaration, as to taking the amount necessary to discharge the deficiency on the tacit legal hypothec *pro rata* from the net proceeds

of all the special mortgages, instead of, as he alleged had been done, solely from the proceeds of the landed property which had been specially mortgaged to him.

The following were the grounds on which the judgment of the Court proceeded:

That it had been proved that on the 18th August, 1834, when Liesching executed the deed of assignation in favour of defendants, his estate was, and that he then knew it to be, irretrievably insolvent, and consequently that this deed, in so far as it was granted in security of debts existing antecedently to the transaction which led to its being granted, was void and of no effect, in consequence of the provisions of the 7th section of Ordinance No. 64.

But that, notwithstanding the erroneous statement to the contrary made in the defendants' plea, it was proved by the evidence that in so far as relates to the bills specified in the deed of assignation as having been accepted by defendant for Liesching, and amounting in all to the sum of £2,501, the assignation was not granted in security of debts existing antecedent to the transaction, which led to its being granted, but in consequence of a new transaction then entered into by the parties, and in security of advances, which, through the medium of the bills accepted by defendants, were made to Liesching *simul ac semel* with the execution of the deed, and consequently that, in so far as it was a security for the advances so and then made by defendants, it had not the effect of preferring one creditor to another, and consequently did not fall under the provisions of the said 7th section of Ordinance No. 64, and was, therefore, from its date, *to this extent* effectual as a *general* mortgage.

That the deed of assignation, unaccompanied by actual delivery, or of something deemed in law to be equivalent to actual delivery of the property assigned, was ineffectual to create a *special* mortgage over such property, which would be effectual in a question with the creditors of the insolvent, and that in a question with them, it could not be rendered an effectual *special* mortgage by any even actual delivery made, or anything equivalent to actual delivery done, after the date of the sequestration of the insolvent's estate, but that it would be rendered effectual as a *special* mortgage by any such delivery, or equivalent to actual delivery, made or done before the date of the sequestration, although within sixty days preceding it, or under any of the other circumstances specified in the 7th section of Ordinance No. 64, which does not apply to securities, or the acts which are required to complete securities given, not for debts previously due, but for advances made *simul ac semel* with the deed of security.

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That neither the act of the insolvent in writing the circular letters, dated 15th August, 1834, to the respective consignees of the goods assigned, nor his delivering these letters to the defendants, nor their transmission by post, addressed to the said consignees, were, *before those circulars were received by the consignees*, equivalent in law to such delivery of the goods as is by law required to complete a special mortgage of movables, but that the receipt of the circular letters by the consignees prior to the date of the sequestration was such intimation to them as was equivalent in law to actual delivery of the goods to which they related.

That on these grounds the defendants were entitled to the sums adjudged to them on the 29th June, and to the sums of £180 and £300 remitted by Dawes, Gore, & Co., because as to all these the assignation had been duly completed by intimation, viz., by the transmission and receipt of the letters intimating the assignation, dated 15th August, 1834, to and by the respective consignees prior to the date of the sequestration of the insolvent.

That the assignation of the bond granted by Waylen to the insolvent, dated 27th April, 1833, was duly and effectually completed in favour of the defendants, by the regular cession, transference, and delivery of that bond to the defendants prior to the date of the sequestration, and that he was entitled to apply and impute any remittances made subsequently to him by Waylen, not exceeding the amount of that bond, in satisfaction of that bond.

NOTE.—Previously to the decision of the case, Van der Riet's claim was discharged in full by assets of the estate other than those in dispute, and which had come into the hands of the trustees, and been found available for the payment of his debt after the pleadings had been filed. No decision, therefore, was given on any of the questions specially applicable to his case.

IN RE CARTER.—LEIBBRANDT AND GEYER *vs.* DICKSON AND BURNIES.

Ship Mortgage.

Feb. 23.
" 27.

A bond specially hypothecating shares in a ship belonging the port of Cape Town, duly registered in the Custo house on the day it bears date, and likewise registered the Public Debt Registry two days after its date, h valid, although the proper endorsement of the particul of the mortgage was not made until after the debt

insolvency, the vessel being absent from Table Bay at the date of the mortgage and the endorsement having taken place within thirty days of her return.

1838. Feb. 23. „ 27.

[Vol. II, Part 3, *p.* 341.]

IN RE VAN HELSINGEN.—BRINK *vs.* THE CREDITORS OF.

Ordinance No. 64, § 74. *Ord.* 6 *of* 1843, § 98.)

Bonus. Trustee. Creditor. Rule of Court, III.

Where at a meeting of creditors it was resolved, in the absence of a mortgage creditor, that the trustee should offer bonus, and where this resolution had been confirmed by the Court and the sale was held on published conditions, —HELD, *that the bond creditor, whose bond was not covered by the net proceeds of the sale, could not object to the payment of fair bonus. He should have applied to the Court before the sale.*

Aug. 14.

In re Van Helsingen.—Brink *vs.* The Creditors of.

A creditor holding a special mortgage over immovable property, sold by the trustee by the directions given by the creditors at a meeting duly held for that purpose, the net proceeds of which are less than his debt, is not entitled to object to a fair sum, *bona fide* and with sound discretion paid by the trustee as strykgeld at the sale, being deducted from the price, the creditors having at said meeting directed the trustee to give such strykgeld as he should think proper, although the objecting creditor had not been present at the said meeting,—the said resolution of the creditors having been reported to and confirmed by the Supreme Court, and the conditions of sale having been published for four weeks in the Master's Office, once in the *Gazette* one month before the sale, again in the *Gazette*, and four times in another paper. The creditor's proper remedy being, to have made application before the sale to the Supreme Court to alter this condition. (*Vide Rule No.* 111.)

STEYTLER *vs.* LOW.

Ordinance No. 64, §§ 89, 91. [*Ordinance* 6, 43, §§ 117, 119.]

Pactum illicitum.

Non-implement by plaintiff discharges defendant of the contract.

Effect of non-implement tempestive *not remedied by subsequent tender of performance.*

1838. Aug. 23.

Steytler vs. Low.

In this case, the question was raised, but not decided, whether an agreement, made by A with B, a creditor of C, whose estate is under sequestration, by which A agrees to buy, and B to sell to A, all B's right to and right of action in the debt due to him by C, for a price less than its amount,—it being a condition of the agreement that B shall, on receiving A's promissory note for the price, sign C's certificate of discharge,—is, in respect of such condition, fraudulent and void, so that A cannot sue B for implement thereof.

It was proved and admitted that by the agreement A bound himself to give B his promissory note for said price, payable three months from 10th November, 1837, *i.e.*, on 10th February, 1838. That A did not do so, or tender any promissory note to B, until the 8th of February,—and then a note not payable until after the 10th February,—that A did not tender the said price in cash until the 12th of February, two days after the lapse of the three months within which it ought to have been paid; and that B, both on the 8th and 12th, refused the tender, and to implement his part of the contract, on the ground that A had failed to perform his.

The Court held that A had failed to perform the condition of the contract, and therefore that defendant was entitled to resile, and on this ground alone gave judgment for defendant, with costs.

SPANGENBERG'S TRUSTEE *vs.* COUSINS.

1839. May 28.

Lien claimed by a book-keeper on the books of his insolvent employer for moneys lent and advanced, refused.

[Vol. II, Part 3, p. 343.]

SMITH *vs.* CAMPBELL.

Aug. 1.

It is not by Ord. 6, 1843 (*although it was by Ord.* 64), *a good defence against a claim on a promissory note that the payee who had endorsed the note was a non-rehabilitated insolvent, who could therefore give no valid title to the plaintiff. By Ord.* 6, 1843, *Sect.* 126, *such endorsation would be good if made after the confirmation of the account and plan of distribution.*

[Vol. I, p. 96.]

THOMSON BROTHERS & CO. *vs.* CUMMING AND NOURSE.

Completion of a contract by an insolvent, after insolvency, is for the benefit of his creditors.

G. contracted to build a house for C., payment to be made in certain instalments, the last on the completion of the house. G. agreed with T. B. & Co. to draw bills on C., in favour of T. B. & Co. on the instalments. T. B. & Co. communicated this to C., who, in writing, undertook that when the instalments were due, he would honour such drafts. In March, 1837, *G. did draw as arranged for the last instalment, and surrendered on the* 11*th October,* 1837, *the building being still unfinished. His creditors would not complete the building. G. completed it himself. T. B. & Co. sued C. on the draft and his written undertaking. C. pleaded that he was indebted to G.'s estate, and not to the plaintiffs.* HELD, *that the contract between G. and C. was terminated by G.'s insolvency. That C. was therefore not bound to honour the draft in question. That the work done by G. after insolvency was done for the benefit of his creditors, notwithstanding their non-interference, and that C. was thus indebted to the estate for the value of such work to the extent of the unpaid instalment.*

1839. June 1.

Thomson Brothers & Co. vs. Cumming and Nourse.

On the 2nd of July, 1834, Cumming and Gush entered into a contract, by which the latter undertook to build a house for Cumming, the price of which was to be paid in certain instalments, at certain periods in the progress of the building, and the last one of £150 on the final completion of the building.

Gush agreed with plaintiffs, for value given him by them, to draw bills for those instalments on Cumming in favour of the plaintiffs. The plaintiffs informed Cumming of this arrangement, who in reply wrote to them:

"12th October, 1835.

"I have received your letter of the 22nd of September, informing me that Mr. Rd. Gush had drawn upon me, in your favour, the several sums of £100, £70, £50, and £150, to be paid out of the 2nd, 3rd, 4th, and 5th instalments which shall become due to him, for building me a house at Roodedraai. I beg to inform you that when the said instalments shall become due and payable, the same shall be honoured.

"GEO. CUMMING.

"To Messrs. THOMSON BROTHERS & Co."

In March, 1837, Gush did draw on Cumming in favour of plaintiffs for the last instalment, and on the 11th October, 1837, Gush became insolvent, and his estate was placed under sequestration, at which time the building was in such a state, and so much of the instalments had been paid to plaintiffs in virtue of Gush's drafts, that, on the completion of the building, Cumming would be indebted to Gush in the full amount of the last instalment, and no more. In consequence of the creditors being of opinion that it would cost more than the amount of the last instalment to finish the house, neither the creditors nor the trustee interfered in any way with the completion of the house, and Gush did complete it. After the completion, plaintiffs sued Cumming in the Circuit Court of Albany, on the bill drawn by Gush in their favour for the last instalment, and on Cumming's promise to honour said draft contained in the above letter of 12th October, 1835.

on & Co. ming arse.

Cumming admitted that he was indebted in the amount of the said instalment to the trustee on Gush's estate, but not to plaintiffs. A commission was granted to the Resident Magistrate to take the oath of Gush,—1st, as to the value of the materials, which, whether worked up or not, were actually on the premises of Cumming, but not yet put up and fixed on the 11th October, 1837; 2nd, as to the value of the materials furnished for the house by any person whatever after that date; 3rd, of the value of the work and labour performed by Gush and those in his employment after the said date; and the cause was removed to the Supreme Court, the trustee being allowed to intervene as a party.

This day, the commission was reported, when it appeared by the oath of Gush that the value of the materials mentioned in the first query was £30. Of those mentioned in the second, about £50, all of which had been procured and paid for by Gush after his insolvency, and of the work and labour in the third, £106 10s.

The Court were of opinion that the insolvency of Gush put an end to the contract between him and Cumming, and, consequently, of the obligation of the latter to honour the drafts drawn by Gush for finishing that part of the building which was unfinished at his insolvency; and that whatever may have been the arrangement between Gush and his creditors, by which he was allowed to finish the house and earn the last instalment, this part of the work must be held to have been done by Gush for the creditors, to whom, and not to plaintiffs, Cumming became indebted for the value of that work, in so far as it did not exceed the amount of the last instalment, which was the whole of the price which remained unpaid.

1839. June 1.

Thomson Brothers & Co. vs. Cumming and Nourse.

The value of this work had now been proved to be £156 10s. The whole of the last instalment of £150 had therefore been earned by Gush for his creditors, to whose trustee Cumming was therefore indebted in that amount.

The Court, therefore, gave judgment for defendants, with costs.

As the value of the materials and labour furnished by Gush exceeded the value of the last instalment, which was all that was due by Cumming, it was unnecessary to decide the question as to whether the property of the materials mentioned in the first query had been vested in Cumming previously to, or remained in Gush at, the date of his insolvency. In the former case, he would have been held to have earned the amount of that value previously to his insolvency, and Cumming, in virtue of his undertaking to honour Gush's drafts, would have been indebted for the amount of that sum so earned to plaintiffs; in the latter, the property of those materials would, on his insolvency, have been transferred to his creditors; and their value, when used in completing the house, would have been earned for and become due to the creditors.

Reed's Trustees *vs.* Adams.

Ordinance 64, §§ 7, 10. (*Ord.* 6, 1843, §§ 84, 92.)

Undue preference.

Acquittance by payment, when bad.

Aug. 29.

Reed's Trustees vs. Adams.

The facts of this case were that Reed was indebted to Adams in two promissory notes, one for £92 2*s.* 4½*d.*, dated 2nd November, 1838, due 1st May, 1839, the other for £23 17*s.*, dated 29th January, 1839, due 15th April, 1839, which Adams had discounted with the Government Discount Bank.

Reed was in a state of insolvency in March, and on a day in the middle of it told the clerk of a merchant who presented to him for his signature a note for £70, being for the price of goods which he had bought in January and February, that there was no use in his signing it, as he would not be able to pay it when due, and made other statements showing that he knew that he was then irretrievably insolvent. On the 20th March, Reed delivered certain goods to Adams, who was an auctioneer, and who sold the goods for £187 10*s.* On the 5th April, Reed and Adams

1839. Aug. 29. — Reed's Trustees vs. Adams.

met, when Adams paid him £71 10*s.* 7½*d.*, and obtained from him a receipt, dated 5th April, 1839, acknowledging to him to have been paid by Adams the full sum of £187 10*s.* On the 5th of April, Reed's two bills aforesaid, amounting to £115 19*s.* 4½*d.*, although not then due, were paid by a cheque drawn by Adams on his account with the said Bank, and the notes taken out of the Bank. On the 10th April, 1839, Reed's estate was placed under sequestration as insolvent, and thereafter the plaintiffs were appointed his trustees. This action was brought by them to recover from Adams the said sum of £115 19*s.* 4½*d.*

The declaration alleged that Reed at the defendant's request delivered to him, the defendant, certain goods, in order that the defendant might sell the same for Reed for commission and reward, to be paid to defendant, who undertook and agreed to account for and pay over to Reed the proceeds;—that the defendant sold the said goods for £187 10*s.*, of which the sum of £115 19*s.* 4½*d.*, remained due and unaccounted for by defendant to Reed when the latter became insolvent.

And that defendant, before Reed became insolvent, was indebted to him in the said sum of £115 19*s.* 4½*d.*, received by him for the use of Reed, and which he undertook to pay to him when requested, but has failed to do so, although often requested, either to Reed before his insolvency, or to plaintiffs, after their appointment as Reed's trustees.

In the plea, the defendant admitted receipt of the goods to be by him sold for Reed's account for a commission, and that he had sold them for £187 10*s.*, but alleged that he had accounted for and paid over to Reed this sum on the 5th April, 1839.

In replication, the plaintiffs stated that the said accounting and payment took place at Cape Town within sixty days preceding the order for sequestration of Reed's estate, and that the acquittance and discharge which was by Reed given within said period to defendant upon such accounting and payment, was given by Reed knowing himself to be insolvent, and had the effect of depriving the creditors of Reed of the benefit of the debt in the said declaration mentioned, and was absolutely void and of no effect.

After the evidence (which proved all the facts above set forth, not admitted in the pleadings) had been led, the *Attorney-General* (Musgrave) contended that the whole transaction was fraudulent, viz., the delivery of the goods by Reed to defendant on the 20th March, under the 7th section, and the acquittance given on the 5th April, under the 10th section of Ordinance No. 64.

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Reed's Trustees vs. Adams.

Cloete, contra, contended that as the defendant had on the 5th April, a right to have retained the proceeds of the sale in security of the notes granted to him by Reed, although not yet due, nothing which was done on the 5th April had the effect of depriving Reed's other creditors of any benefit whatever, and that in respect of the form of the declaration and replication it is not competent for the defendant now to found on the 7th and 10th sections of the Ordinance No. 64.

The further hearing of the case was postponed *sine die.*

The Court had expressed an opinion that the facts which the plaintiffs had proved were sufficient to entitle them to set aside the transaction between Reed and Adams to the extent of the £115 19*s.* 4½*d.* claimed, and to demand repetition of that sum from the defendant, if not under the 10th, at least under the 7th section of Ordinance No. 64, and that if the Court, after the further hearing of the case, should decide that the defendant, in respect of the argument founded by him in the shape and form of the pleadings, must be absolved from the instance in this action, it would be competent for the plaintiffs to bring a fresh action against him, founded on the said 7th section.

In consequence of this opinion, the parties settled the case amicably, by defendant paying to plaintiffs the £115 odd claimed, and each party paying their own costs. (*Vide Breda's Trustee* vs. *Volraad, infra.*)

In re Magodas.

Ord. No. 64. (*Ord.* 6, 1843, §§ 128–9.)

A second sequestration, the order for which was granted in ignorance that there had been a previous sequestration, set aside as the first was still proceeding.

Nov. 19.

In re Magodas.

In this case, it appeared from the report of the Master that the estate of the insolvent had been placed under sequestration on the petition of the insolvent by an order dated 2nd January, 1835, due notice whereof was given; and the first and final meeting of the creditors was duly advertised in the *Government Gazette* on the 9th January, and attended by the Master on the 31st January, 1835, pursuant to that notice.

No creditor appeared and no debt was proved at that meeting; the only property found in the insolvent estate was a bed and an arm-chair, valued at £1 17*s.* 6*d.*

1839. Nov. 19.

In re Magodas.

In his schedule the insolvent had given up the name of one creditor only, Jacob de Villiers, of the Paarl, who duly approved of the order of sequestration, the first and final meeting aforesaid, and the summary liquidation and distribution of the assets of the estate.

Mr. J. G. Steytler, then the authorized agent of Mr. de Villiers for the proof of his debt, declined proceeding in the matter. No debt being proved, no trustee was elected, and no further proceedings taken in the sequestration.

On the 1st May, 1839, on the petition of the insolvent, an order was made for the sequestration of his estate by Mr. Justice KEKEWICH, who was not made aware of the former sequestration. The proceedings in the second sequestration went on regularly in due form and course, until after the third meeting, when, on the examination of the insolvent, the existence of the first sequestration was discovered. Whereupon an application was made by the trustees under the second sequestration to have the former order of sequestration set aside.

But the Court unanimously found that the first sequestration, not having been worked out, was still subsisting, and that being the first valid sequestration, it must be sustained; and that the second must be set aside, seeing that the first sequestration extended over and affected the whole of the present estate and effects of the insolvent.

They therefore set aside and annulled the second sequestration.

BREDA'S TRUSTEE *vs.* VOLRAAD.

Ord. No. 64, § 7. (*Ord.* 6 *of* 1843, § 83.)

Action to set aside undue delivery of goods.

Nov. 21. Dec. 6.

Breda's Trustee vs. Volraad.

This action was brought, first, to set aside the transfer and delivery of certain rice, coffee, sugar, and tea, of the value of £300, made by the insolvent to defendant on the 29th April, 1839, without any valuable or onerous consideration; at the time of making which delivery and transfer the insolvent was actually insolvent, or was thereby made insolvent. Second, to set aside the delivery and transfer of the said goods so made on the said 29th April, 1839, by insolvent to defendant, in payment or satisfaction of a certain promissory note, bill of exchange, or acceptance made by the insolvent in favour of the said defendant for £105, which sum the insolvent then owed

to the defendant, by which delivery and transfer to the defendant the insolvent preferred one creditor to another, he not being compelled thereto by legal process and knowing himself to be insolvent, and within sixty days preceding the making of the order for the sequestration of the estate.

In respect, whereof, the plaintiff claimed redelivery of the said goods, or payment of £300 or the value thereof.

The defendant pleaded the general issue.

It was admitted that Breda's estate had been placed under sequestration on the 7th May, 1839.

It was proved and admitted that defendant had received from the insolvent the goods mentioned in the declaration.

It was admitted by plaintiffs that if defendant paid the insolvent £287 for the goods, he paid him a fair, reasonable market price for the goods, being £10 more than the insolvent had bought them for.

It was proved by the evidence of the insolvent, which, however suspicious it might be, the Court could not disregard in the absence of all proof to the contrary, that defendant did pay to him, the insolvent, in cash and notes, £287 for the goods; and to the extent of £80, this was proved by unexceptionable witnesses; that £80 of this was paid to Kish, from whom part of the goods in question had been bought; £40 to Beck, a creditor of the insolvent; and £62 applied by insolvent to his own uses,—no part of any of these sums having gone back to defendant in any shape; and that the remaining £105, as soon as it was received by the insolvent in notes and cash from the defendant, was instantly, and without leaving defendant's house, when this payment was received by the insolvent, handed back by the insolvent to defendant, in payment and exchange for a note or bill for £105 held by defendant in which the insolvent was the actual debtor, it having been granted for his accommodation and discounted to him by defendant, and which had the name of A. Beck on it as endorser, Beck being then solvent and able to have paid this note or bill.

It was proved that a bill had been drawn by the insolvent either on A. Beck in favour of one P. van Breda, or on P. van Breda in favour of Beck, and endorsed by the payee, whoever he was. There was a discrepancy between the evidence of the insolvent and Beck, as to whether this bill, after it fell due on the 21st April, had been destroyed, and a new one, for the same amount with the same parties, given to defendant, or whether the original bill had been preserved by defendant and an acknowledgment given him by P. van Breda and Beck that they would continue their liability to him if he gave the insolvent time. But it was not denied that this bill, either the original or the renewed one, was that given by defendant to insolvent in getting back the

1839. Nov. 21. Dec. 6.

Breda's Trustee vs. Volraad.

£105 which he paid him on account of the goods. The Court were satisfied from the evidence that a part at least of the goods in question had been bought by the insolvent on credit, in order that, by an alleged sale of them to defendant, the latter might receive payment of the £105 which defendant owed him, and that £80 of the cash given by defendant to insolvent was given to enable him to pay a part of the price, so as to induce the seller to give him credit for the rest.

The *Attorney-General*, for the defendant, maintained that the discharge of the bill of £105 by means of the alienation of the goods to defendant did not give him any preference; because Beck was then solvent, and because defendant at the time might have recovered the amount from Beck; and that as the transaction had thus given defendant no preference, it was not affected by the provision of Ordinance No. 64. He also maintained that the transaction was of the same nature with the payment of a debt in the regular course of trade, that it was of no consequence whether the payment was made in money or goods, and was in fact a transaction in the usual and fair course of business. (*Cowper's Rep.*, *p.* 634, *Rust* vs. *Assignee of Papps*; *Lee's Nisi Prius*, *vol.* 1, *p.* 277; *Bell's Bankrupt Law*, *2nd vol.*, *c.* 4, § 3; *Thomson's Digest*, *vol.* 1, *voce Bankrupt*, *p.* 388; *Thom. on Bills*, *p.* 672.)

Musgrave, *contra*, *Burton's Insolvent Law*, 108—110.

Cur. adv. vult.

Postea (6th December, 1839).—The Court gave judgment for the plaintiff in the second amount for £105, and costs. (*Vide Reed's Trustees* vs. *Adams*, 29th Aug., 1839, *ante*.)

See the other branch of this case, 6th Dec., 1839.)

Harris *vs.* Buissinne's Trustee.

Tradition. Jus in re.

1840. Feb. 11. " 20. " June 23.

An agreement of sale of immovable property, followed by delivery of possession by the vendor to the purchaser, gives the purchaser nothing more than a jus ad rem, a personal claim against the vendor to convey the in re or dominium to him, by transfer coram lege loci.

On the order of the sequestration of the vendor's estate conveyance coram lege loci having been effected, dominium became vested in the Master of the Supreme Court and ultimately in trustees for the ben

Part of the purchase price having been paid by the purchaser to the vendor, the purchaser has a personal claim against the estate for damage sustained by non-fulfilment of the vendor's undertaking to perfect the sale by making legal transfer, and for restitution of the price, and is entitled for such personal claim to be ranked concurrently with the other personal creditors of the vendor, but has no right of preference whatever.

1840. Feb. 11. „ 20. June 23.

[Vol. II, Part 2, p. 19.]

IN RE CRAUSE.—BUYSKES, TRUSTEE OF A B, *vs.* MOORE AND BENINGFIELD, TRUSTEES OF CRAUSE.

Ordinance No. 64, § 87. (*Ord.* 6 *of* 1843, § 113.)

Motion to obtain payment of dividends.

Misappropriation or misapplication of the assets (dividends) of an insolvent estate by one of co-trustees without the knowledge and consent of his co-trustees does not discharge them of their liability to the creditors for such assets.

April 13.

In re Crause.—Buyskes, Trustee of A B, *vs.* Moore and Beningfield, Trustees of Crause.

This was an application by Buyskes, trustee of the estate of A B, to obtain payment from the trustees of the estate of Crause of the dividend which, in the account and plan of distribution of the estate of Crause duly confirmed by the Supreme Court in August, 1839, had been awarded out of that estate to the estate of A B, of which the applicant was the trustee.

No appearance was made for Beningfield.

The *Attorney-General*, for Moore, produced an affidavit by Moore, setting forth that his co-trustee had, without his knowledge or consent, obtained possession of the whole of the assets of the estate, and had undertaken to pay the dividends to the creditors; that previous to the 12th of March last, he, the respondent, had received notice that a motion would on that day be made, on the part of the present applicant, to the Supreme Court, in terms of the 87th section of Ordinance No. 64, to obtain payment of the dividend from the respondent and his co-trustee, but that this motion had not been made, and that on the 13th of March, the applicant had informed respondent of this, and stated as the reason that he had received a cheque from Beningfield for the amount of the dividend, and that "it was all right;" and maintained, on these grounds, that the

1840.
April 13.

In re Crause.—Burykes, Trustee of A B, *vs.* Moore and Beningfield, Trustees of Crause.

applicant must be held to have released the respondent, and could now only look to Beningfield for payment. It was admitted by both parties that the applicant had been induced not to make the motion on the 12th, by a promise of Beningfield to give him a cheque for the dividend and that Beningfield had sent him a cheque on the bank, dated 24th, instead of 12th March, that the applicant had given no receipt for the amount of the dividend to Beningfield, and had kept the cheque in his possession until the 24th, when he presented it at the bank, where payment of it was refused on the ground of "no effects."

The Court held that the misappropriation or misapplication of the assets of an insolvent estate by one of several trustees, without the knowledge and consent of his co-trustees, did not discharge them of their liability to the creditors for such assets, and that the applicant's abandonment of the motion on the 12th March, his taking the cheque from Beningfield, and remaining passive until payment of the cheque was refused on the 24th, did not constitute any such *novatio debiti*, or create any such legal objection, as to bar the applicant from now claiming payment of the dividend from the respondent, who must look for his relief to his co-trustee.

The Court, therefore, made an order on the respondent to pay the applicant the dividend claimed and the costs of this application.

In re K.

Ordinance 64, § 44. (*Ord.* 6 *of*, 1843, § 40.)

Trustee, election of, set aside.

April 13.

In re K.

In this case, at the meeting for the election of truste
the insolvent estate of K., a majority in number o
creditors present voted for A, and a majority in value
and C.

The Resident Magistrate returned A, B, and C, as
been duly elected trustees, but stated in his return
majority in number had voted for A, and the ma
value for B and C.

The Court held the election null and void, and t
election must be held.

IN RE MAGODAS.—LEEWNER *vs.* TRUSTEE OF MAGODAS. 1840. June 12. Aug. 25. Nov. 26.

An uncertificated insolvent, Ordinance 64 *being then in force, purchased immovable property which was mortgaged by the vendor to A, for* £925. *In order to enable the vendor to effect transfer, the plaintiff paid off the mortgage, and the insolvent, on receiving transfer "simul ac semel" and "pari passu," executed a bond in plaintiff's favour for the amount. The trustee of the estate claiming to have the house sold, the plaintiff claimed that he should be allowed to prove his bond in the sequestration, and the Master having refused to admit the proof, the debt having been contracted subsequent to the sequestration, the Court confirmed the Master's decision.*

[Vol. III, Part 3, p. 345.]

STRETCH *vs.* CAMPBELL.

Insolvency. Ordinance No. 64, §§ 9, 49, 50. (*Ord.* 6, 1843, §§ 93, 46, 48.) *Consideration of note.*

O., an uncertificated insolvent, carried on business after his insolvency with the knowledge, although not with the express permission, of his trustees, and sold goods to C., who knew of his insolvency. C. paid O. with two notes in his favour or order. O. endorsed the notes to S., who also knew of the insolvency. Subsequently S. took from C., directly, without O.'s name thereupon, two other notes in lieu of the first-mentioned notes, and now sued C. on one of them. C. pleaded no consideration; but the Court held that the delivery up of the first two notes was sufficient consideration to found this action. Aug. 31. 1841. Feb. 4. " 26.

SEMBLE: *If S. had sued on the notes originally given, it being proved that the insolvent had given valuable consideration for them, S. would have successfully maintained the action, even if the trustees had intervened and claimed on the notes.*

[Vol. II, Part 2, p. 262.]

BAARD *vs.* DE VILLIERS.

1840. Nov. 30. *De V. was surety on a bond which stipulated that the principal debtor should be liable to pay on one month's notice. The principal debtor surrendered; and without notice having been given to the surety, he was now called upon to pay the amount of the bond.* HELD, *that the insolvency of the principal debtor purified the condition as to notice, and made the bond immediately demandable from the surety.*

[Vol. II, Part I, p. 55.]

STILL *vs.* GILBERT.

Arrest during insolvency. Rules of Court, 8, 14.

Ord. No. 64, § 95. (*Ord.* 6 *of* 1843, § 95.)

Nov. 5. 30. *It is competent for the Court or a Judge at Chambers, on proof by affidavit that a debtor whose estate is under sequestration and who has not yet had his certificate intends to leave the Colony, to order, if they should see cause, a writ to be issued for the arrest of the debtor until he shall give bail not to leave the Colony.*

[Vol. III, Part 2, p. 121.]

IN RE HERRON *vs.* SEARIGHT & CO.

Proof of debt on Bill of Exchange.

H. drew on Z. & Co. in favour of S. & Co., for £800 *for advances on an intended shipment. The shipment did not realize the amount of the bill, which was protested for non-acceptance and non-payment, and returned by Z. & Co. to S. & Co. H. surrendered his estate. S. & Co. proved for the whole amount of the bill. On objection raised, the Court directed the proof to be amended into a proof for the balance.*

The Master had allowed Searight & Co. to prove on th
[illegible]erron for a debt of £800, in respect of the followin

"£800.

"Cape Town, 30th January, 1840.

"At thirty days after sight, pay this our first of exchange (second and third of the same tenor and date not paid) to the order of Messrs. James Searight & Co., the sum of £800, for advances on my intended shipment.

"Value received.

"To R. Z. & Co., per *St Helena.*

"W. H. HERRON.

"To Messrs. R. ZWELCHENBURT & Co., Liverpool.

Indorsed: "Pay Messrs. R. ZWELCHENBURT & Co.

"p.p. J. SEARIGHT.
"C. E. LAROCHE."

This bill, which had been transmitted to R. Zwelchenburt & Co., between whom and Searight & Co. a partnership to a certain extent existed, was protested *at the request of the holders thereof* (names not mentioned), on the 28th May, 1840, for non-acceptance, and on the 30th June, 1840, for non-payment, and was returned thereafter by R. Zwelchenburt & Co. to Searight & Co.

On the 10th April, 1840, Zwelchenburt & Co. wrote the following letter to Waters & Herron: "Your draft in favour of Messrs. Searight & Co., £500, has met with every honour, as well as that of Mr. W. H. Herron, £800, which we perceive will have a distinct application, and which we have consequently placed to a separate account."

It was admitted the bill of Mr. W. H. Herron for £800 was the bill on which the claim had been proved.

Herron died early in 1840.

The firm of Waters & Herron had also, on account of that firm, shipped and consigned to Zwelchenburt & Co. goods, and had drawn bills on Z. & Co. in favour of Searight & Co., which had been transmitted by them to Zwelchenburt & Co.

On the 10th June, 1840, Zwelchenburt & Co. wrote to Waters & Herron, complaining of the very inferior quality of the goods which had been consigned to them both by Waters & Herron and by Herron, in consequence of which their value was much below that stated in the invoice, and they were very unsaleable, and adding, "In the meanwhile, we have thought it only right under the circum-

1841. Feb. 11.

In re Herron *vs.* Searight & Co.

stances, especially of the decease of your partner Herron, to protest your drafts in favour of Messrs. James Searight & Co. for £2,700. We feel sure you will view this step in its true light, and that you will readily refund to said friends the excess of advances which may eventually appear against you."

Cloete, for applicant, admitted that Searight & Co. were entitled to prove a debt against Herron's estate for the balance occasioned by the difference between the proceeds of the goods shipped by the *St. Helena* and the amount of the bill, but contended that it lay on Searight & Co., by rendering a full account of the sales of the goods, to prove the amount of the balance which they claimed.

The *Attorney-General*, while he admitted that Searight & Co. could ultimately claim payment of no more than the balance, contended that they were entitled, under all the circumstances, in the mean time to prove their debt on the estate for the whole amount of the bill.

The Court, on the grounds stated by *Cloete*, referred to the Master to ascertain the balance due to Searight & Co., and thereupon to admit them to prove for that balance.

Question of costs to stand over.

IN RE HERRER.—HERRER *vs.* BUISSINNE'S TRUSTEE.

Ord. No. 64, § 89. (*Ord.* 6 *of* 1843, § 117.)

Rehabilitation.

The trustee of A, duly authorized thereto by a majority of creditors, may sign the certificate of B, an insolvent.

May 11.

In re Herrer.—Herrer *vs.* Buissinne's Trustee.

To entitle the insolvent Herrer to obtain his certificate, the consent of a certain creditor, Buissinne, whose estate was also under sequestration as insolvent, was necessary.

Buissinne's trustee called a meeting of his creditors, all of whom except one, consented to Buissinne's trustee signing Herrer's certificate. The trustee, doubting whether the consent merely of a majority was a sufficient warrant to him, declined signing Herrer's certificate without an order of the Court. The Court held that with the consent of a majority of creditors given at a meeting held for that purpose, the trustee was warranted and required to sign the certificate, and that the non-consenting creditors had their remedy under the provisions of the 89th section of Ordinance No. 64 (Ord. 6 of 1843, 117th section, which

has, however, since been repealed by Act 15 of 1859), and ordered Buissinne's trustee to sign Herrer's certificate.

1841. May 11.

In re Herrer.—Herrer *vs.* Buissinne's Trustee.

[NOTE.—The Act of 1859 having clothed the Court with power to rehabilitate, irrespective of the creditors, this decision probably only extends, by analogy, to releases under sections 106 and 107, where the consent of creditors is still required.]

IN RE WATERS—SEARIGHT & CO. *vs.* TRUSTEE OF WATERS AND TRUSTEE OF WATERS & HERRON.

Joint and separate estates: Proof of debt on.

Aug. 30.

In re Waters.—Searight & Co. *vs.* Trustee of Waters and Trustee of Waters & Herron.

The following case was agreed upon by the parties in this cause.

In the commencement of 1840, Messrs. Waters & Herron made sundry shipments of tea, &c., by sundry vessels, on consignment to Messrs. Zwelchenburt & Co., of Liverpool, through Messrs. James Searight & Co., of Cape Town. On account of which shipment, Searight & Co. gave Waters & Herron their drafts on Zwelchenburt & Co., for £3,500, in addition to which the following bills were drawn by Waters & Herron on Messrs. Zwelchenburt & Co., in favour of James Searight & Co., and also on account of the above shipments of tea:

One dated 8th February, 1840, in favour of J. Searight & Co., payable thirty days after sight	£500
One dated 11th February, 1840, in favour of J. Searight & Co., payable thirty days after sight	800
One dated 29th February, 1840, in favour of J. Searight & Co., payable thirty days after sight	600
Total ...	£1,900

Which amount was paid to Waters & Herron by Searight & Co., in several payments between 28th January and 29th February, 1840. The said bills were endorsed as follows: the first "pay yourselves" *p.p.* J. Searight & Co. C. E. Laroche; the second in the same manner; and the third, *p.p.* Jas. Searight & Co. C. E. Laroche,—and were in due course forwarded to England.

On 2nd April, 1840, Wm. Henry Herron, partner in said firm of Waters & Herron, departed this life, and by his

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last will and testament appointed William Dickson and his partner, Robert Waters, his executors. The latter alone proved, took out letters of administration, and acted thereon.

On 13th June, 1840, all the said bills for £1,900 were protested in Liverpool for non-payment at the instance of R. Zwelchenburt & Co., the holders, and sent back to Searight & Co., who received them on 25th September, and immediately called upon Waters for the repayment of the money advanced as aforesaid; he was afterwards on 29th October, threatened with legal proceedings for the recovery thereof, in reply to which, Waters sent the following memorandum to Searight & Co.:

"Bills will be given by W. & H. for £1,900, or such sum as may be agreed on, at three and four months. Interest to be settled in account; and as so much is said about security, W. will deposit the title deeds of his property at Claremont, as collateral security."

In lieu of these protested bills, and in order to meet any deficiencies that might appear in the proceeds of the shipments, Mr. Waters, the surviving partner of the firm, and who had, for the purpose of winding up the business of Waters & Herron, continued to use the partnership firm, gave, 30th October, Searight and Co. the following promissory notes signed Waters & Herron:

One for £250, 30th October, 1840, at three months' date, due 30th January, 1841.

One for £250, 30th October, 1840, at three months' date, due 30th January, 1841.

One for £500, 30th October, 1840, at three months' date, due 30th January, 1841.

One for £250, 30th October, 1840, at four months' date, due 29th February, 1841.

One for £250, 30th October, 1840, at four months' date, due 29th February, 1841.

One for £500, 30th October, 1840, at four months' date, due 29th February, 1841.

And at the same time wrote Searight & Co. the following letter, and deposited the title deeds therein mentioned:

"Cape Town, 30th October, 1840.

"Messrs. SEARIGHT & Co., Cape Town.

"GENTLEMEN,—I hereby deposit in your hands the title deeds of my property at Claremont, and engage to pass a mortgage bond on the same in your favour on or before Tuesday next, as a security for your claim against the firm

of Waters & Herron, arising from certain bills of exchange in England drawn by them, payable to your order and returned protested for non-payment.

"I remain, &c.,

"ROBERT WATERS."

On 6th November, 1840, in security of the payment of the above promissory notes, Mr. Waters passed a mortgage bond in the following terms:

"Know all men whom it may concern, that Robert Waters appeared before me, Registrar of Deeds, who declared for the better security and also the due and punctual payment of six promissory notes, bearing date respectively the 30th day of October last, made and signed by the appearer trading under the style or firm of Waters & Herron, in favour of Messrs. James Searight & Co., or order, &c., to bind specially as a mortgagé certain piece of land, with the buildings thereon, now called Claremont, &c., &c. And, moreover, hereby binding generally his person and all his property, both such as he is already or may in future become possessed of, movable and immovable, without any exception, and submitting them all and the choice thereof, in case the appearer shall make default in payment of all or any of the said promissory notes, to constraint and execution as the law directs. In witness whereof, &c., &c.

"R. WATERS,

"In my presence,

"JAMES CAREY, Registrar."

In passing this mortgage bond, it is admitted that Robert Waters meant to bind himself simply as security for said last-mentioned promissory notes, and not otherwise.

On 27th November, 1840, several of the creditors of the joint estate of Waters & Herron, having taken out provisional summonses against R. Waters, as the surviving partner and as executor testamentary of W. H. Herron, the other partner of the said firm of Waters & Herron.

On 28th November, Waters called a meeting of the creditors, and laid before them a statement of the affairs of Robert Waters and W. H. Herron, as individuals, and of the firm of Waters & Herron, and it was at said meeting proposed by all the creditors present, except Jas. Searight & Co., to put the estate in trust, or surrender the estate,

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in order to prevent a preference to any creditor. Searight & Co., after having considered the matter for some time, and after having been assured that, if they refused to join the other creditors, the estate would be positively on the Monday following surrendered, agreed to waive the preference they might have by virtue of the said mortgage. And the creditors who had taken out provisional summonses withdrew the same. A minute to that effect was drawn up and signed by Searight & Co., as well as the other creditors who were preferent.

And in pursuance of said minute a deed of trust was drawn up.

On 16th December, 1840, at a meeting duly convened, the following resolution was passed:

"That Mr. Robert Waters be requested to surrender the joint and separate estate of himself and deceased partner, with all possible dispatch, in order to avoid a preference to any of the creditors in either estate. And, further, that the deed of assignment in trust prepared under direction of said creditors at a former meeting and the provisions thereof be abandoned. And, further, that upon surrender of said estate, application be made to the Supreme Court for the appointment of a provisional trustee, and that Mr. Richard Webber Eaton, on behalf of the Trust and Assurance Company, be such trustee."

Signed by sundry of the creditors, including Searight & Co.

On 23rd December, 1840, the joint and several estates were surrendered as insolvent. Messrs. Searight & Co. ranked upon the partnership estate of Waters & Herron for the amount of the six last-mentioned promissory notes, amounting to £2,000, and made no claim upon the separate insolvent estate of R. Waters, in virtue of said notes or of said act of hypothecation, until the 1st June, 1841, when the Master rejected the same, on the grounds "that the deed upon which the proof of debt was sought had not been perfected by time, and because the original debt, for the better security of which the bond was given, was not a private debt due to J. Searight & Co. by R. Waters, but a joint debt due by the firm of Waters & Herron."

Mr. Waters' private estate was only rendered insolvent by inserting in the schedules £3,196, being the estimated amount of the partnership deficiency, as well as his own private debts, against his assets; and were Messrs. Searight & Co. to rank on it, it is admitted that it would have the effect of preventing any reversion of his estate coming into the partnership estate, and be in prejudice of the personal creditors of Waters, as well as of the creditors of the joint

estate of Waters & Herron. Messrs. Searight & Co. have rendered their account with the estate of Waters & Herron, in relation to the foregoing shipments of goods by the above-mentioned vessels, when, after debiting and crediting the estate with the six last-mentioned notes, the balance against Waters & Herron appears to be £1,561 19*s.* 11*d.*

The question for the decision of the Court is, whether the claim of Messrs. Searight & Co. to prove as creditors against the separate estate of R. Waters has been properly rejected by the Master.

WM. PORTER.

WM. MUSGRAVE.

Porter maintained, 30th August, 1841, that the only question now before the Court was merely whether claimants were entitled to prove to any amount whatever on the private estate, or, in other words, whether they are or are not creditors of Waters as an individual, either as a principal debtor or as a surety to them, and not as to the manner in which the claimants are to be ranked in competition with the other creditors of Waters in his private capacity, or the mode of distributing the assets of the joint estate of Waters & Herron, and the separate estate of Waters, among the company creditors and the private creditors respectively. He maintained that even if the effect of the 7th section of Ordinance No. 64 was to render the mortgage bond of the 6th November, 1840, so absolutely null and void that it could not be used even as evidence sufficient to constitute an acknowledgment of debt by Waters, as an individual, to claimants, yet the minute of Waters, dated 29th October, 1840, and the six bills dated 30th October, 1840, which, having been made by Waters six months after the dissolution of the firm by the death of Herron, were as much the deeds of Waters as if they had been signed "Robert Waters" instead of "Waters & Herron," the title under which he thought proper to carry on business (*Bell's Com., vol.* 2, *p.* 646, *last Edition*), and that those bills were debts of the individual Waters, and not of the estate of the company which belonged to Robert Waters and W. H. Herron, trading under the firm of Waters & Herron. He argued that the objecting creditors were placing themselves in a dilemma, because, if there was not a debt by Waters, as an individual, existing before the execution of the mortgage bond, then the mortgage bond did not fall under the provisions of the 7th section of the Ordinance, because, in that case, it would not have the effect of giving a preference to a previous creditor.

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2ndly. He maintained that the 7th section only annulled the preference given by the mortgage, but did not annul the deed so as to prevent it from being given effect to in proof as a document of debt. He referred to the analogy of the former Shipping Registry Acts, and quoted *Abbot*, 1*st Edition*, *p.* 80; *Kerrison* vs. *Cole*, 8 *East*.

Cloete followed on the same side. Both of them limited the right of their clients to prove on the private estate, to being allowed to prove only for the balance remaining due, after deducting, from the total amount of their debt, the amount of any dividend to be received by them out of the partnership estate. (*Collier on Partnership*, *p.* 536.)

Musgrave, *contra*, maintained that as the six bills were granted by Waters under the signature of the partnership firm, although after the dissolution of the partnership by the death of Herron, for a debt due by the partnership before its dissolution, and in fact were merely substituted for bills granted by the partnership before its dissolution, those bills did not create or constitute a debt on the private estate of Waters. He quoted 16th section of Ordinance No. 64, and maintained that in virtue of the 7th section, the deed of the 6th November, 1840, was so annulled that it could not be used even as evidence to prove the existence of the debt. (*Bell's Com.*, 1,621, *c.* 18, *B.* 4, *Cap.* 2, § 1; *Smith's Coml. Law*, *p.* 157; 2 *Burrows*, 1,077.)

The Court ordered that the claimants be allowed to prove, on the separate estate of Waters, their debts on the six bills dated 30th October, 1840, minus the sum of £435 0*s.*1*d.*, admitted by claimants to have been received by them, reserving all questions as to the order of ranking and preference between the claimants and the creditors of Waters in his individual capacity, and between the claimants and the partnership creditors of the joint estate of Waters & Herron.

Costs to abide the further order of the Court.

IN RE WATERS & HERRON.—SUTHERLAND *vs.* THE TRUSTEES.

Ord. No. 64, § 47. (*Ord.* 6 *of* 1843, § 44.)

Ord. No. 64, § 74. (*Ord.* 6 *of* 1843, § 98.)

Trustees' commission: is it on net or gross amount of shares sold?

Trustees have a discretionary right of selling estate shares by private sale.

In this case, in which Sutherland objected to the liquidation account as framed by the trustees, it was argued that the trustees had made an excessive charge for commission on the sale of twenty bank shares, inasmuch as they had charged five per cent. on the gross amount of the shares, and the dividends thereon, instead of charging commission only on the *net amount* received by the trustees in respect of the shares after payment of the amount for which the shares had been pledged. The Court postponed their decision until after the amount of the trustees' remuneration shall have been assessed by the Master, in terms of the 47th section of the Ordinance No. 64.

It was objected that the trustees had forfeited all claim to compensation, because they had sold the said bank shares in a hurried manner by private sale, through the medium of a broker, without having given any notice of the intended sale in the *Government Gazette*, and without directions from the creditors, contrary to the provisions of the 74th section of the Ordinance No. 64, while five shares belonging to the private estate of one of the partners had been sold a short time after by public auction, duly notified, for £5 a share more than had been got for the shares sold by private bargain. It was answered, it is not necessary by law that movable property should be sold by public sale, nor to give notice of the sale in the *Government Gazette*. (*Vide Burton's Commentary on the Ordinance, p.* 113.)

It was admitted that the third meeting of the creditors had been held on the 2nd March, and that the sale of the shares took place on the 18th March.

The Court held that the objectors had failed to show that the trustees had acted illegally, or that they had not exercised a sound and beneficial discretion in the sale of the shares through a broker, rather than by public auction, and that it was not necessary to have notified the sale of the bank shares, which it was intended should be made, through a broker in the *Gazette*.

The Court sustained the objectors that the trustees had, in ranking Sutherland's debt, deducted £91 17*s.* 1*d.* from the amount for which he had proved against the estate, without bringing the question as to the amount for which he ought to have been allowed to prove under the review of the Court.

MAYNARD *vs.* GILMER'S TRUSTEE.

Attachment of jus ad rem to immovable property.

1841. Dec. 14. *W. purchased, and partly paid for, certain immovable property, of which he did not, however, get transfer. G., a creditor of W., got judgment, and sued out a writ, by virtue of which the aforesaid immovable property was attached. W. surrendered. His trustee got transfer and sold the property, and awarded G. a preference under the last attachment. A bond creditor objected. The Court set aside the preference accordingly, on the ground that W. had only a "jus ad rem," which could not be attached by a writ founded on a jus in re.*

[Vol. III, Part 2, p. 116.]

IN RE WRIGHT.

1842. Jan. 12. *Where an amount settled on a wife, then a minor by ante-nuptial contract had not, in the terms of the contract, been secured by mortgage or landed property, but becomes merged in the private funds of one of the trustees after the wife's majority, no tacit hypothec is created for such amount on the insolvent estate of such trustee.*

[Vol. I, p. 166.]

NORDEN *vs.* BRINK.—IN RE MAGODAS.

Ord. 64, § 82. (*Ord.* 6 *of* 1843, § 108.)

Liquidation Account, filing of. Costs.

Any person interested in an insolvent estate succeeding in a motion against a trustee who has filed no account after the lapse of the limit of six months, is entitled to his costs, no matter what the trustee's reason may be. It is the trustee's duty to apply to the Court tempestive, for prolongation of time.

Feb. 3. The Court condemned the trustee to pay the costs of an application, made by a person having an interest in the

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estate of Magodas, for an order on the trustee to file his account in terms of the 82nd section of Ordinance No. 64, the trustee having suffered six months to elapse without having filed any account: and expressed an opinion that in every similar case, where, in consequence of such default on the part of the trustee, any person should, by motion, obtain such an order on the trustee, he will be entitled to the costs of his motion, whatever reasons the trustee may have had for not filing the account. As in such cases it is the duty of the trustee tempestive to apply to the Court for further time, to file his account.

BRINK, TRUSTEE OF MAGODAS, *vs.* NORDEN.

Ord. No. 64, §§ 11, 49, 50. (*Ord.* 6, 43, §§ 46, 48.)

The word "creditor" means a creditor before the order of sequestration is made.

Second order of sequestration made during subsistence of the first, set aside.

Fraudulent insolvency: It is a good answer to indictment for, under a second order of sequestration obtained during the subsistence of a former order, that the insolvent had not "duly surrendered" the second time, in terms of the section.

M. surrendered in January, 1835. *His schedule contained the name of only one creditor De V., who had due notice, but did not prove. No other creditor proved and no trustee was elected. M. continued to trade and made a certain payment in satisfaction of goods purchased from N. In May,* 1839, *he again surrendered. This being subsequently brought to the notice of the Court, the second order of sequestration was set aside on the* 19*th November. On the* 8*th November, one B. purchased the claim of De V. On the* 31*st, he proved it, and elected himself trustee in the first sequestration, and brought an action against N. to have the payment to him set aside:* HELD,—*that B. not having been a "creditor" at the date of the first order for sequestra-*

tion, was not such a creditor as is contemplated by the Ordinance.

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This action was brought by the plaintiff to recover from the defendant, for behoof of the creditors of the insolvent Magodas, £73 8*s* 10¾*d* paid by the insolvent to the defendant, who then was his creditor, on the ground that said payment was fraudulent and null and void, under the provisions of the 11th section of Ordinance No. 64.

Plea, the general issue.

Magodas, the insolvent, and Charles Beale, were called and examined by plaintiff, after which the further hearing of the case was postponed, in order that the parties might settle "a case," to be submitted for the judgment of the Court:

Postea (Thursday, August 25),—In this matter, the parties had agreed to the following "case," which was now submitted to the judgment of the Court.

2nd January, 1835.—On this date an order of sequestration was issued by Mr. Justice MENZIES, on the petition of Magodas, the above-named insolvent, and notice thereof was given in the *Government Gazette* on the 9th of said month, and the meeting of creditors attended by the Master of this honourable Court, on the 31st of said month, pursuant to that notice. That no creditor appeared and no debt was proved, and the only property found in the estate was the insolvent's bed and an arm-chair, valued at about £1 17*s*. 6*d*. That the insolvent gave up the name of one creditor, only, in the schedule annexed to his petition, namely, Jacob de Villiers, of the Paarl, who was duly apprized by the Master of the order of sequestration, and of the appointment of the first and final meeting aforesaid, for the proof of the debts, and the summary disposition of the assets of the estate.

That Mr. J. G. Steytler, one of the trustees hereinafter mentioned, was at that time the authorized agent of the said Jacob de Villiers, for the proof of the said debt, but he declined proceeding in the matter. No debt having been proved, no trustee was elected, and no further proceedings taken from that time. The insolvent, nevertheless, continued his business as a tallow-chandler, and had various dealings and transactions with the plaintiff and defendant among others, who were induced from his own representations and others to believe him solvent and trustworthy. In satisfaction of one of said transactions with the defendant, to wit, a sale of goods and merchandise, he passed his note of hand, of which the following is a copy for the amount:

"Cape Town, 1st October, 1838.

"Two months after date, I promise to pay to Mr. B. Norden, or his order, the sum of rds. 979 2. 1.

"MAGODAS."

Endorsed received for Mr. B. Norden.	£67	10	0
	5	5	0
	0	13	6
	0	0	5
	£73	8	11

Which note of hand the insolvent duly honoured under the circumstances stated in his evidence, which evidence is admitted as forming a part of this case.

1st May, 1839.—In consequence of Magodas having subsequentiy contracted various other debts with the defendant and others to a large amount, which he was unable to pay, he on this date, presented a petition and ontained an order from Mr. Justice KEKEWICH, again placing his estate under sequestration, notice whereof was given inthe *Government Gazette*, and the last-mentioned order was proceeded with in the same manner as if no prior orderof sequestration had been granted. Debts to a large amonnt were proved at the first and second meeting, and Messrs. J. G. Steytler, F. G. Watermeyer, and the defendant B. Norden, were elected as trustees at an adjournment of the second meeting held before the Master on this date, which election was reported by him on the 15th of said month, and confirmed by a decree of this honourable Court.

July Crim. Sessions, 1839.—The trustees gave due notice of their appointment, and having discovered that the insolvent had concealed some of his property, and had, moreover destroyed his books, they caused him to be indicted, and at these sessions put on his trial for fraudulent insolvency, on which occasion his Counsel took an objection to the indictment, and contended that the estate of the insolvent, could not have been *duly* surrendered on the first day of May, then last past, on the ground of previous existing and then still subsisting sequestration. The Acting Attorney-General was not, nor were the trustees aware of this circumstance before, and considering the objection to have weight, withdrew the prosecution, whereupon the Court, under the 9th section of Ordinance No. 40, directed a verdict of acquittal.

1st August, 1839.—On this date the Acting Attorney-General moved this honourable Court that the sequestration of the insolvent's estate upon his surrender dated the

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2nd January, 1835, might be set aside by reason that no debts had been proved against said estate at the meeting duly called and held by the Master as aforesaid; and, further, that the sequestration upon this surrender of the 1st of May, 1839, and the appointment of trustees and other proceedings duly had thereunder, might be declared valid. Whereupon it was referred to the Master to report generally on the state of the said estate, under the two orders of sequestration.

12th August, 1839.—On this date the Master made his report to the Court in substance and to the effect hereinbefore set forth.

8th November, 1839.—On this date, the plaintiff purchased the claim of the said Jacob de Villiers, and on the 19th of the said month this honourable Court, reading the said report, the affidavit of the said plaintiff, and upon hearing Counsel in his behalf, ordered that the second order for placing the estate of the said Magodas under sequestration, obtained on the petition of the insolvent, should be quashed and annulled.

31st December, 1839.—On this date, the plaintiff duly proved his claim against the estate of the said insolvent, and on the 4th day of March, 1840, elected himself sole trustee, which election was confirmed by the order of this honourable Court on the 7th of said month.

On the 17th of March following, Mr. J. H. Bam, the only other creditor entitled to prove under the first sequestration, appeared before the Master, and proved his claim to the extent of rds. 997 5. 2.

22nd November, 1841.—The plaintiff, on this date, filed with the Master a first and provisional account of his administration, whereby it appears that the estate (in consequence of a suit at law between himself, as trustee, and one Goris Leewner, relative to some property claimed as belonging to the estate, and other disbursements) was indebted to him for disbursements the sum of £60 11*s.* 1¾*d.*, over and above his aforesaid claim of £58 2*s.* 0¼*d.*, making together the sum of £118 13*s.* 2*d.*, and he seeks by this action, instituted on the 23rd day of November, 1841, to recover from the defendant the sum of £73 8*s.* 11*d.*, being the amount of the note of hand paid to him by the insolvent on the 1st of December, 1838, with interest, on the ground that Magodas was not compelled by legal process to make the same, and knew himself at that time to be insolvent; consequently that the said payment, under and by virtue of the 64th Ordinance, is fraudulent and null and void.

The defendant maintains the contrary, for the following among divers other good and sufficient reasons:

1st. Because the payment impeached does not fall within the meaning, nor is the same affected by any of the provisions of the said Ordinance No. 64.

2nd. Because Magodas did not know himself to be insolvent within the meaning of the said Ordinance, when he made the said payment to the defendant.

3rd. Because even if Magodas had known himself to be insolvent within the meaning of the said Ordinance, yet the said payment was really and *bonâ fide* made within the meaning of the said Ordinance so as to protect it.

4th. Because the payment in question having been made for an equivalent consideration in 1838, the state of the two creditors under the surrender of 1835 is not affected by anything which has taken place.

5th. Because those creditors, or those whose rights they or either of them now possess, having permitted Magodas to carry on trade and business, are bound by the payment made by him, as being their agent.

6th. Because by force of 49th and 50th sections of Ordinance No. 64, the goods and merchandise of the defendant, the sale of which formed the consideration for the said payment, though obtained through the said Magodas, immediately vested, first in the Master, and afterwards in the plaintiff as trustee, so that if the plaintiff, as trustee should recover the amount which he now seeks, the defendant would be entitled to sue him as trustee for goods sold and delivered to him as trustee; wherefore the defendant, in order to avoid circuity of action, should be permitted to retain the payment sought to be recovered.

7th. Because if, by reason of the fraud of the insolvent, it should be held that no sale of the goods of the defendant at all took place, the defendant would still be entitled to reclaim the said goods, or recover the value of them from the said plaintiff, in his said capacity, by which means the consequence stated in the last preceding reason would again follow.

But whether or not the said plaintiff, in his said capacity, is entitled under the circumstances to recover from the said defendant the said sum of £73 8*s.* 11*d.*, together with the interest aforesaid, the parties respectfully refer as matter of law to the judgment of this honourable Court.

Cloete, for plaintiff, argued in favour of plaintiff's claim, and quoted the 49th and 50th sections of Ordinance No. 64, and maintained that the goods purchased by Magodas from defendant never became the property of Magodas, and must, if the property of them passed at all from the vendor, have become vested in the trustee. 2nd. He maintained, that if Magodas had sold the goods and got cash for them, that cash

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instantly became the property of the trustee. 3rd. He referred to the 11th section of Ordinance No. 64.

The Court held, that the payment made by the insolvent to defendant was not a payment contemplated by the 11th section of Ordinance No. 64, and that the provisions of that clause, therefore, did not apply to it. That the "creditor" contemplated in the first line of the clause, is a creditor who was so before the order of sequestration was made; and, therefore, gave judgment for defendant, with costs.

NEETHLING *vs.* BLOMMESTEIN'S TRUSTEES.

Ord. No. 64, § 29. (*Ord.* 6, 1843, § 22.)

Sheriff's attachment. Pignus prætorium. Collusion. Fraud. Creditor æque instans et urgens, who is not.

N. took out execution on a judgment debt against B. B. shortly afterwards surrendered. N. claimed a preference for debt, costs, and charges by virtue of the attachment. B.'s trustees resisted, on the ground that the attachment had been fraudulently obtained by N., in connivance and collusion with B. at a time when the latter anticipated the immediate surrender of his estate. It was proved that the insolvent told the plaintiff after his debt had become payable, and had not been paid, that he was insolvent and had abstained from surrendering, and suggested to him to take legal proceedings for the recovery of his debt, admittedly with the intent that the creditor might secure himself, and that he had given assistance to the creditor in suing out the summons and receiving service thereof. HELD, *confirming Meyer* vs. *Dusing's creditors, that no payment, or pignus, or hypothec, voluntarily made and constituted to or in favour of a creditor at a time when both creditor or debtor knew that the defendant was insolvent, in satisfaction of a debt then due and exigible by the creditor, could, in respect of such knowledge, and of its being the voluntary act of the debtor, be set aside as fraudulent except where made or constituted at a time when another creditor or other creditors had had recourse to such proceedings for recovering their debts as in law to make them be deemed to be æque instants vel urgentes vel vigilantes with the creditor to whom the payment was made, or in favour of whom the mortgage was constituted. That a bond creditor who had given notice*

calling up her bond is not, especially before expiry of the term of notice, such a creditor æque instans et urgens. That for a debtor to remain quiet and allow one of his creditors to obtain by regularly conducted legal proceedings a pignus prætorium over part of his property is not equivalent to a debtor's voluntarily making payment or granting a pignus to his creditor. That the proved circumstances of this case, ut supra, did not amount to such collusion or fraud on the part of the insolvent as to render the pignus judicially obtained by the creditor reducible.

1844. Feb. 27. April 12.

Neethling vs. Blommestein's Trustees.

In this case it was admitted that the plaintiff, who was a creditor of Blommestein, the insolvent, in virtue of a promissory note granted by Blommestein in his favour for £104 2*s.* 8*d.*, dated 1st February, 1841, and which became due on the 1st of May, 1841, had, subsequently, to the said 1st of May, obtained judgment against Blommestein for the amount of the said note and costs; on which judgment he sued out a writ of execution on the 31st May, in virtue of which writ the Sheriff, on the 22nd May, attached, in satisfaction of said debt and costs, certain goods of Blommestein. That, on the 4th of June, 1841, Blommestein surrendered his estate, and that the goods which had been attached by the Sheriff were placed under sequestration, with the rest of the estate, in terms of 29th section of Ordinance No. 64. That those goods were thereafter sold by the defendants, and realized more than sufficient to satisfy the plaintiff's said debt with all costs and charges.

The plaintiff claimed a preference for the said debt, costs, and charges, on the proceeds of the said goods, by virtue of the legal attachment* therefore by him previous to the surrender of the insolvent's estate, which the defendants had refused to allow, and thereupon the plaintiff prayed that the defendants should be ordered by the Court to amend the account and plan of distribution of said estate, and to award the plaintiff the preference claimed by him as aforesaid.

The defendants maintained that the plaintiff was not entitled to the preference claimed by him, on the ground that the said writ of execution, and the attachment of the said goods in satisfaction of the same, had been fraudulently obtained by the plaintiff, by connivance and collusion between the plaintiff and the insolvent, at a time when the insolvent anticipated the surrender and sequestration of his

* Ord. 6, 1843, § 22, allows a preference merely for the costs of the writ and its execution, and not for the debt or proceeds.

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estate, he being pressed by other creditors for payment of debts legally due by him, and that by such connivance and collusion the plaintiff intended to obtain, and the insolvent intended to give, or to allow the plaintiff as a creditor to get, a preference above the insolvent's other creditors, by means of such writ and attachment;—and, secondly, on the ground that, in the month of May, 1841, whilst the insolvent actually contemplated or intended to surrender his estate as insolvent, he, the insolvent, delayed the said contemplated surrender at the special instance and request of the plaintiff, for the purpose of allowing the plaintiff to obtain a judgment against him, and an attachment of his goods, and thus procuring to the plaintiff a preference on the insolvent's estate ; which judgment, attachment, and preference having been so obtained by the said plaintiff, the insolvent immediately surrendered his estate.

In his replication, the plaintiff denied the facts alleged in the defendants' plea: and, secondly, their sufficiency if proved, as an answer to his claim.

The defendants, in proof of the facts alleged in their plea, called Johan Michiel Adriaan van Blommestein (the insolvent): I surrendered my estate on the 4th June, 1841. The cause of my surrendering my estate was because my father, for whom I was a surety, had surrendered his, and my father's estate was also a creditor of mine. Before my surrender no creditors had been pressing on me for payment of their claims. Before I surrendered, Miss van Coller, of Stellenbosch, called in payment of a notarial bond for £60, which I was indebted to her. Plaintiff had summoned me for the amount of the debt referred to in the declaration. I think I had received the notice from Van Coller before that summons was served on me. I do not remember Mr. Van der Poel having called in any capital. I did not, on receiving the notice, form the resolution of surrendering my estate. I tried to settle her claim, but I did not succeed, and I then resolved to surrender my estate. This, I think, was about a month before I actually surrendered my estate. [It was admitted that plaintiff's summons was served on the 7th May, 1841, returnable on the 20th May.] I was in my house when the Sheriff came, on the 22nd of May, to make the attachment of my goods. I had heard that plaintiff had obtained judgment against me before the Sheriff came. I cannot tell from whom I heard this. Before plaintiff had taken out the summons against me, I told him that I was going to surrender my estate, and that as he had a debt against me he had better summon me for it in order not to lose his money. I did not say the same to Miss Van Coller. I told plaintiff this, because he was my

brother-in-law, and had assisted me with money now and then. I wanted to save him. I had no other conversation with him before he obtained sentence. He said, yes, he would do it. I cannot say how long this was before the summons was taken out, but he proceeded immediately against me. I came to town knowing that I would be there served with the summons. I took the note of hand, the voucher of my debt to plaintiff, to Mr. Reid, the attorney, in order that he might take out the summons. I did this at the request of the plaintiff. After the summons was served on me, I returned to Stellenbosch, and I think I told the plaintiff what I had done. If plaintiff had not been a creditor of mine, I would have surrendered my estate soon after I received the notice from Van Coller, and before the day I was served with the summons. I postponed the surrender of my estate in order to favour plaintiff. The note now shown me is that on which plaintiff summoned me, dated 1st February and due 1st May, 1841. I think it must have been in the beginning of 1841 that I received the notice from Van Coller. The three months mentioned in the notice had not expired when I surrendered my estate on the 4th June, 1841. I had no conversation with Mr. Neethling about purchasing in my estate before the summons was issued, or before the sequestration. I had such a conversation with him after the estate was advertised.

The defendants closed their case.

The plaintiff called no witnesses.

Brand, for defendants, quoted *Voet*, 42, 8, 17, *and* 18; *Matthæus de Auctionibus*, *b.* 1, *cap.* 19, *num.* 102; *cap.* 20, *num.* 12 *and* 13; *Matthæus Paræmia*, 7, *num.* 16; *Burge* 3*rd*, *p.* 611, and maintained that by the authority of *Matthæus* it was proved that the legal meaning of *gratificatio*, in the law of Holland, was the same with that of *collusio*, and therefore that *gratificatio*, in the passages above quoted from *Matthæus de Auctionibus*, and *Voet*, must be construed as if the word *collusio* had been there used instead of it. That, therefore, according to these authorities, wherever any collusion had taken place between the debtor and the creditor, the payment made in consequence of such collusion was liable to be set aside. That *voluntary* payment by a debtor to his creditor, when both knew that the debtor was insolvent, was such collusion, whether any other creditor had previously to or at the time of such payment been pressing, urging, or suing the debtor for payment of his debt or not. At all events, that it was so when any other creditor was then *instans* or *urgens* the debtor to pay. That the notice given by Miss Van Coller had the effect in law to make her considered, from the date of its service on the

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insolvent, as a debtor *instans* or *urgens*, and to entitle her to set aside any payment after it made, or *pignus* given, to her prejudice. That any payment or *pignus* made or given under such circumstances as to render it liable to be set aside at the instance of any one creditor, *eo ipso* became liable to be set aside at the instance of all the debtor's other creditors, and that the defendants were therefore entitled to maintain the present defence for behoof, not only of Miss Van Coller, but of all the other creditors. And lastly, that the insolvent having enabled the plaintiff to attach, and thus acquire a *pignus prætorium* over the debtor's estate, by informing him of his inability to pay his debt, and necessity of his, the creditor's, having recourse to legal proceedings to obtain payment of his debt,—by the assistance given him in suing out and receiving service of the summons, and intentionally delaying the surrender of his estate at a time both of them knew him to be insolvent, until after the plaintiff, by virtue of a writ of execution, had attached the goods in question, was in law equivalent to his having voluntarily given plaintiff a *pignus* or hypothecation over those goods; and the transaction and its effects were, therefore, liable to be set aside on the ground of fraud and collusion, in the same way that a payment made to or hypothecation constituted in favour of the plaintiff after the 1st of May, and previous to the surrender of the estate, would, under these circumstances, have been set aside by the common law of this Colony.

Attorney-General, for plaintiff, quoted the same authorities and *Grot. Int.*, 2, 5, § 4, *No.* 11, and maintained the contrary of all the propositions maintained by defendants, and especially that no payment or *pignus* or hypothec voluntarily made or constituted to or in favour of a creditor at a time when both creditor and debtor knew that the defendant was insolvent, in satisfaction of a debt then due to and exigible by the creditor, could in respect of such knowledge and of its being the voluntary act of the debtor, be set aside as fraudulent, except (*in the case specified by Voet.* 42, 8, 17, *Denique Sententiam. Voet, ibid*, § 18, *viâ autem, Matthæus* 1, 20, §§ 12, 13) where made or constituted at a time when another creditor or other creditors had had recourse to such proceedings for recovering their debts as in law to make them to be deemed to be *æque instantes vel urgentes vel vigilantes* with the creditor to whom the payment was made, or in favour of whom the mortgage was constituted.

Postea (12th April). The Court, while they concurred in the last proposition maintained by the plaintiff, and to

which they had given effect in the case of *Meyer* vs. *Dusing's Creditors*, 29*th September*, 1830 (Vol. I, p. 480), held that even if Miss Van Coller could be deemed in law to have been a creditor *instans vel urgens*, in respect of her notice, the transaction in question could have been set aside as fraudulent only in so far as it was prejudicial to her,—and also held that a creditor in a debt before enforcing payment of which he is by the instrument which constitutes the debt required to give previous notice to his debtor to pay, cannot in law, especially before the period of the requisite notice has expired, be deemed to be a creditor *instans vel urgens*, merely in consequence of having given such notice,—considered it unnecessary to give any decision or opinion on any of the other questions raised by the parties, because they held that for a debtor to remain quiet and allow one of his creditors to obtain by regularly conducted legal proceedings a *pignus praetorium* over part of his property, was not equivalent either to the case in which a debtor voluntarily made a payment or granted a *pignus* to his creditor,—and that this case must be decided according to its own circumstances, and that the insolvent in this case, neither by telling the plaintiff after his debt had become payable, and had not been paid, that he was insolvent, nor by suggesting to him to take legal proceedings for the recovery of his debt, although he had given this information and suggestion with the intent that the creditor might secure himself, was not thereby guilty of such collusion or fraud, as to render the *pignus* judicially obtained by the creditor reducible; that the assistance which had actually been given by the insolvent to the plaintiff in suing out the summons, and receiving service thereof, while no other creditor had had, or even threatened to have, recourse to legal proceedings, did not amount to such collusion or fraud; and that as the law did not require an insolvent debtor voluntarily to surrender his estate at any time, he was not guilty of such fraud and collusion as was in law required to set aside the plaintiff's preference, by abstaining from surrendering his estate, although he knew that his doing so might enable the plaintiff to acquire a preference over his other creditors; and gave judgment for plaintiff, as prayed, with costs.

In re Clarence and Ahlers.

Ordinance No. 6. 1843, §§ 38, 117.

[*Act* 15 *of* 1859 *has repealed* § 117 *of Ordinance* 6, 1843. *But the interpretation given to* § 38, *of the Ordinance, is still of effect.*]

Creditors consenting to insolvent's certificate how to be reckoned in number and value, and how in value.

Where it becomes necessary under the Ordinance to reckon by value, creditors of £30 *must be creditors who have proved for* £30. *It does not matter whether their claims have, by dividends, been reduced to a sum under* £30 *at the time of reckoning.*

1844. Aug. 15.

In re Clarence and Ahlers.

In this case, the Master reported that from the written consent of the creditors of the insolvent, R. Clarence, it has not appeared to him "that three-fifths in number and value of such creditors, or nine-tenths in value alone, have consented to the discharge of the said Clarence." That the said consent has been obtained after the confirmation by the Court of the plan of distribution, and after the division of assets among the creditors, and not before. That the assets, after being first applied to the discharge of the only preferent debt, left a balance of £542 15*s.*, which was distributed *pro rata* among fourteen concurrent creditors, whose debts originally amounted to £954 14*s.* 10¾*d.*, leaving the balance still due to said fourteen creditors, £361 19*s.* 10¾*d.* Of which the debts still due to the only two creditors whose deficiency amounts to £30 and upwards, are

J. Clarence	£63	0	10
T. Lawton	179	1	8
And the value of the debts of the other twelve whose deficiency does not amount to £30 each	119	17	4¾
	£361	19	10¾

And that the said Clarence is the only creditor who has not signed the said consent of the discharge.

The Master made this special report, in order that the Court might decide whether, under the provisions of the 38th section and 117th section of the Ordinance No. 6, 1843, the creditors,—whose debts, although originally greater in amount than £30 each, had, by the dividends which they

had received before signing the consent, been reduced under £30 each,—were now to be reckoned in number in ascertaining whether three-fifths of the insolvent's creditors in number and value had consented to his discharge. And, whether, in ascertaining whether nine-tenths in value alone had consented, the amount of the insolvent's debts was to be reckoned as they stood before any dividend had been paid, or according to the balance still due after deducting the amount of the dividend received.

The Court held that the amount of the debt of each creditor, with reference to his right to have his vote counted in number, and the total amount of all the insolvent's debts, with reference to what will constitute the majority in value required by the Ordinance, must be estimated according to the amounts for which the creditors have been allowed to prove debts under the provisions of the Ordinance; and that no deduction is to be made, either from the amount of the individual debts, or the total debt, on account of any dividend which may have been received by the creditors after the debts have been proved. And found the insolvent entitled to his discharge.

The insolvent in this case being entitled to his discharge in respect of the above finding, it was unnecessary for the Court to express any opinion on the point raised as to whether the limitation in section 38, depriving creditors whose debts are under £30 from having their votes reckoned in *number*, applied solely to cases of votes, properly so called, given at meetings of creditors, or also to cases when they are called on to express their consent or dissent, under the provisions of the 117th section.

SMUTS, TRUSTEE OF NEETHLING, *vs.* NEETHLING.

Ord. 64, § 79. (*Ord.* 6 *of* 1843, § 103.)

Ord. 64. §§ 7 *and* 11.

Abandonment of sale to insolvent by creditors.

Cession.

Collusion must be specially pleaded. Pleading.

The abandonment of an agreement of sale under the 79th section of the Ordinance 6, 1843, *has no other effect than to discharge the trustee of the creditors from all liability*

to fulfil any of the stipulations or conditions of the agreement which remained still unperformed or unfulfilled, to entitle the seller to obtain or retain possession of the subject sold, and to sue the insolvent estate for any damage which he can prove to have been sustained by him, by the non-fulfilment on the part of the insolvent of the agreement, but did not entitle the creditors to have the sale annulled and rescinded ab initio, nor to have matters restored to the same situation in which they were before the agreement was made, or before any of the stipulations or conditions had been performed or fulfilled, nor to reclaim from the seller any part of the price of which previous to the abandonment he had obtained payment.

1844. Feb. 13.

Smuts, Trustee of Neethling vs. Neethling.

The declaration in this case set forth that on the 1st April, 1842, defendant sold to the insolvent the Stellenbosch Corn Mill for the price of £2,000, to be paid by the insolvent, 1st, by his taking over a mortgage on the mill in favour of J. van der Poel for £1,000. 2ndly, by paying to defendant, on the 14th June, 1842, £625 in cash. 3rdly, by giving defendant a mortgage bond on the mill for £375. That the insolvent had occupied the mill from the 14th February, 1842, and continued in the occupation and possession thereof until 20th September, 1843.

That nothing was done by either party in execution of this contract until the 14th November, 1842, on which day the insolvent, at the instance of the plaintiff, in lieu of the mortgage bond over the mill for £375, passed a notarial bond, in favour of the defendant, for £375 as the residue of the purchase money of the mill, payable three months after notice given to pay, for which bond A. C. van der Byl, P. G. van der Byl, and J. H. Neethling, the insolvent's brother, bound themselves as sureties *in solidum* and co-principal debtors. That on the 16th December, 1842, the defendant gave to the said P. G. van der Byl and J. H. Neethling notice to pay the bond three months after such notice.

That on the 17th December, 1842, the said J. H. Neethling communicated to the insolvent that this notice had been given him, and urged him to settle defendant's demand, who thereupon declared to the said J. H. Neethling that he was unable to do so, and had no means of paying the same. That the insolvent then, knowing himself to be insolvent, with the knowledge and privity of the said J. H. Neethling, applied for and obtained from his sister-in-law, R. H. van der Byl, a good-for, or acknowledgment of debt, dated 19th November, 1842, by her payable to the insol-

vent, for £375, in consideration for which he executed a writing, whereby he sold to her the whole of his movable property, goods, and chattels, for £200, and engaged that the £200 should go in part payment of the £375, for which the good-for was granted by her, and bound himself to execute a mortgage bond for £175, the balance, over his place called Vlyggenberg, in her favour, which he did afterwards execute on the 28th April, 1843. That the insolvent on obtaining the good-for, ceded the same to the said J. H. Neethling, on the 20th December, 1842, for the special purpose to pay with this the said mortgage bond for £375. That the said J. H. Neethling received, in payment of this good-for, £375 from the said R. H. van der Byl's agent on the 2nd May, 1843, and on that day paid the same to defendant in payment of the said bond for £375.

That upon the 21st April, 1843, the defendant caused a summons to be taken out against the insolvent, for payment of the £625 of the price which had been payable on the 14th June, 1842, and obtained judgment by default thereon against the insolvent, on which execution issued on the 12th May, 1843, in satisfaction whereof an attachment was laid on the greater part of the movables sold as aforesaid by the insolvent to R. H. van der Byl, but possession of which the insolvent had been allowed to retain, and then had. That on the 15th June, 1843, the insolvent surrendered his estate as insolvent, and the plaintiff was afterwards elected his trustee. That on the 20th of September, 1843, plaintiff, in pursuance of a resolution of the insolvent's creditors, and in virtue of the 79th section of Ordinance 64, gave notice to the defendant that the creditors abandoned the said agreement of sale, and demanded from him repayment of the £375, so paid as aforesaid to the said defendant by the said J. H. Neethling, offering to allow the said defendant to prefer his claim of damages, if any, on the said insolvent estate to be ranked on the *judicium preferentia et concurrentiae.*

That by this abandonment of the agreement of sale, the plaintiff has become entitled to demand from the defendant repayment of the said sum of £375.

That by reason of the cession of the said good-for for £375 made on the 20th December, 1842, by the insolvent to the said J. H. Neethling, for the purpose of paying the bond so called in as aforesaid, and the payment of said bond in manner aforesaid, to the defendant on 2nd May, 1843, when the insolvent knew himself to be insolvent and was not compelled by legal process to make the same, and which cession had the effect to prefer one creditor to another, the said cession was absolutely void and of no effect, and

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the plaintiff is therefore entitled to demand from the defendant repayment of the said £375, for the benefit of the creditors of the said insolvent estate.

That by reason that the payment to the defendant in satisfaction of the said bond for £375 so called in, made by the insolvent to the said J. H. Neethling from moneys obtained from or on behalf of the said insolvent, on the 2nd May, 1843, was so made when the said insolvent was not compelled by legal process to make the same, and when he knew himself to be insolvent, and had the effect to prefer one creditor to another, the said payment was absolutely void and of no effect, or was fraudulent, and the said plaintiff is therefore entitled to demand back from the defendant the said sum of £375, for the benefit of the creditors of the said insolvent estate, or to claim that the said payment, so fraudulently made, be set aside and the defendant condemned to repay to plaintiff the said £375.

The defendant pleaded, 1st, that admitting, as for the purpose of this plea he doth admit, all and singular the several matters of fact in the declaration contained, he denies that the said matters of fact are sufficient to support the conclusions of law which the plaintiff hath deduced therefrom. 2nd. That in case the plea aforesaid should be overruled, he denies all and singular the allegations in the said declarations contained.

The plaintiff, in his replication, joined issue with defendant on both pleas.

It was agreed that before leading evidence on the issue of fact joined on the second plea, the parties should argue the issue of law joined on the first plea.

After hearing *Brand*, for the plaintiff, without calling upon the *Attorney-General* for the defendant, the Court unanimously gave judgment for defendant, with costs.

The Court held that the abandonment of the agreement of sale under the 79th section of the Ordinance had no other effect than to discharge the trustee of the creditors from all liability to fulfil any of the stipulations or conditions of the agreement which remained still unperformed or unfulfilled, to entitle the seller to obtain or retain possession of the subject sold, and to sue the insolvent estate for any damage which he can prove to have been sustained by him by the non-fulfilment on the part of the insolvent of the agreement, but did not entitle the creditors to have the sale annulled and rescinded *ab initio*, nor to have matters restored to the same situation in which they were before the agreement was made, or before any of the stipulations or conditions had been performed or fulfilled, nor to reclaim

from the seller any part of the price which previous to the abandonment he had obtained payment of.

Secondly, that the cession of the good-for had been made by the insolvent to J. H. Neethling, his surety, and not to the defendant, to whom it had never been ceded at all, and, therefore, that whether under the circumstances averred in the declaration the creditors might or might not be entitled, under the 7th section of Ordinance No. 64, to have the cession declared void as between the insolvent and his surety, J. H. Neethling, and to recover from the said Neethling the £375 which he had received in payment of the good-for, they were not entitled to demand from the defendant repayment of the £375 which had been paid by J. H. Neethling, to the defendant, which was a payment made by the said J. H. Neethling in discharge of the obligation which he had personally undertaken by binding himself as surety *in solidum* and co-principal debtor in the bond for £375, which bond he had been called on by the defendant to pay; and which, therefore, could not be held to have been payment made by the insolvent to defendant.

Thirdly, that for the reason last stated,—namely, that the payment so received by defendant from J. H. Neethling, was a payment of a debt due by the said Neethling to defendant, and not by the insolvent to defendant,—it did not come within the provisions of the 11th section of Ordinance No. 64.

The Court refused to allow plaintiff to lead evidence to prove either that the defendant was in collusion with the insolvent and J. H. Neethling, in the transaction by which the good-for for £375 was obtained from Miss Van der Byl, ceded to J. H. Neethling, and payment of it received by him from Miss Van der Byl, and the sum so received by him paid to the defendant,—or that the defendant, although not in collusion with the insolvent and J. H. Neethling in the previous part of the transaction, yet at the time he received payment of the said £375 from J. H. Neethling, knew how the latter had obtained the money with which he made the said payment,—on the ground that no such collusion or knowledge was averred in the declaration to have taken place or existed, and abstained from giving any opinion as to the effect which such collusion or knowledge on the part of the defendant, if proved, would have had in support of the plaintiff's claim that defendant should be condemned to repay to the creditors the £375 which he had received.

The Court also abstained from giving any opinion on the question mooted by the *Attorney-General*,—whether when the vendor of immovable property, not yet transferred to

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the purchaser, at a time when he, the vendor, is willing and ready to transfer the property so soon as the conditions of sale are performed by the purchaser, receives from the purchaser, then knowing himself to be insolvent, any payment, cession, delivery, &c., &c., &c., in discharge or satisfaction of the whole or any part of the price or other consideration for which the property was sold,—such payment is to be deemed in law to be "a payment made to a creditor," under the provisions of the 11th section of Ordinance No. 64, or a cession, delivery, &c., "having the effect to prefer one creditor to another," under the 7th section of that Ordinance.

HIDDINGH, TRUSTEE OF MANUEL, *vs.* B. NORDEN.

Ord. 6 *of* 1843, §§ 28, 86.

Compensation founded on mutuality of debt.

Evidence admitted by Court after case closed.

To a declaration by M.'s trustee against N. for first instalment of purchase money of a house, defendant pleaded compensation founded on two promissory notes by N. in favour of M. before sequestration. To this it was replied, 1. *That these notes had not been proved in the sequestration.* 2. *That the debts were not mutual* 3. *That the sale was made not by M., but under assignment.* 4. *That the debts on the notes being concurrent, the allowance of compensation would have the effect of a preference over the other concurrent creditors. It was proved that M. surrendered on the 26th April,* 1844. *On the 26th January,* 1844, *M. passed two notes, one of* £57 11*s.* 9*d., payable 29th May,* 1844, *in favour of N., or order, which note had been blank endorsed by N., was discounted on the 13th February by one T., and paid when due by N. The second note was made by M. in favour of D. & N., and discounted by them. On the 12th March,* 1844, *M. had called a meeting of his creditors, at which N. & D., for D. & N., being both present and concurring, an assignment to a trust company was agreed on. This assignment fell through through the non-assent of some of M.'s other creditors. M. then gave a power of attorney to E., the Secretary of the Trust Company, to sell the house in question, at which sale N. became purchaser.* HELD, *that the plea*

of compensation was good in so far as founded on the note for £57, but bad on that for £29, in respect of which defendant had not given credit nor the cause of debt accrued until after the order of sequestration. That in respect to the £57 note, the cause of defendant's debt accrued on the 26th January, the date of the bill, and not on the 25th May, when, sequestration having intervened, he paid it. That the mutuality of credit was on the 10th April, the date of sale, and before notice of sequestration to N. That although there was no concurrentia debitorum on the 26th April, the proviso to the 28th section of Ordinance 6, 1843, refers to the period when the credit was given or the debt accrued, and not to the period concurrentiae debitorum. That the circumstances connected with the inoperative assignment made no difference in the principles to be applied, nor the non-proof in M.'s sequestration of the notes on which the compensation was founded.

1844. Dec. 3.

Hiddingh, Trustee of Manuel, vs. B. Norden.

The declaration claimed from the defendant £541 13*s.* 4*d.*, as being the first instalment of the price of a certain house and premises purchased by the defendant at a public sale held on account of Isaac Manuel, now an insolvent (whose trustee, the plaintiff has, subsequently to said sale, been appointed), which, by the conditions of sale, was made payable in cash at the time of the sale, the plaintiff offering, on payment of said sum, to give transfer of the said house, &c., to the defendant.

In his plea the defendant admitted the sale and purchase, &c., as stated in the declaration, but pleaded that the said Isaac Manuel, on whose account, as stated in the declaration, the said sale was had, was before the sequestration of his estate as insolvent, and still is, indebted to the defendant in the sum of £87 1*s.* 4*d.*, being the amount of two promissory notes, bearing date, respectively, the 26th January, 1844, made by the said Isaac Manuel, the first for £57 11*s.* 9*d.*, payable on the 26th May, 1844, to the defendant or his order, and the second for £29 9*s.* 7*d.*, payable on the 26th May, 1844, to the order of the firm of Davis & Nathan, of which said notes, respectively, overdue and dishonoured, the defendant was before the said sequestration, and still is, the legal holder. That the defendant on the 24th day of July, in fulfilment of said contract of sale, tendered and offered to the plaintiff to set off by way of compensation against an equal amount of the said first instalment of £541 13*s.* 4*d.*, the said sum of £87 1*s.* 4*d.* so due and owing as aforesaid to the defendant;

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and did further tender and offer then and there to pay the said plaintiff the balance between the said sum of £87 1*s.* 4*d.* and that of £541 13*s.* 4*d.*, to wit a balance of £454 12*s.*, but to receive which balance so tendered, and to allow the said set-off, and to fulfil the said contract, the plaintiff refused and still refuses.

The plaintiff, in his replication, denied all and every thing contained in the plea, save that he admitted the tender and offer of the two promissory notes therein mentioned; and joined issue thereon.

And further, in case the defendant should succeed in proving that the said insolvent was, before the sequestration of his estate as insolvent, and still is, indebted to him in the said sum of £87 1*s.* 4*d.*, as alleged in the plea, the plaintiff pleaded: 1st. That the defendant is not entitled to claim any compensation thereof as in the said plea pleaded, because the said debt of £87 1*s.* 4*d.*, if correct, had not been proved in said insolvent estate according to the provisions contained in section 27 of Ordinance No. 6, 1843, as it ought to have been. 2ndly. That he is not entitled to plead compensation of said £87 1*s.* 3*d.*, against the said first instalment of £541 3*s.* 4*d.*, because the said debts do not constitute such mutual debts, or such mutual credit, as by law the defendant would be entitled to plead compensation of. 3rdly. That before and at the time of the sale defendant had due notice that the said sale was held of the property of the said Manuel by R. W. Eaton, Secretary to the Cape of Good Hope Trust and Assurance Company, in trust for the general benefit of the creditors of the said Manuel, in virtue of, or for the purpose of carrying out, an assignment by said Manuel in trust to the said Company, for the general benefit of his creditors, made in virtue of a resolution of his creditors at a meeting thereof held on the 12th March, 1844, at which meeting the defendant and the said Davis & Nathan were present, or to which resolution so taken they had consented and concurred, and which such resolution had been taken, and said assignment had been resolved on in consequence of the representation made by the said Manuel to his creditors, that his liabilities fairly calculated exceeded his assets fairly valued,—that he was unable to pay his debts,—and that his estate, in point of fact, was insolvent; and which estate, after the said sale, was actually surrendered as insolvent. 4thly. That the said debt of £87 1*s.* 4*d.* is *concurrent* in its nature, and would, if allowed in compensation as claimed, thereby obtain a preference over other preferent claims proved in said insolvent estate.

The defendant, in his rejoinder, admitted that the debt of

£87 1s. 4d. is a debt concurrent in its nature; and denied all the allegations of fact and conclusions of law in the replication; and joined issue.

At the trial the evidence proved the meeting of Manuel's creditors on 12th March, 1844, the presence both of the defendant and of Davis, for Davis & Nathan, at said meeting,—that a statement of his affairs was then produced by Manuel, clearly showing that his estate was irretrievably insolvent, there being a deficiency of £8,000;—that all, or a great majority, of the creditors present, in order to prevent the necessity of a surrender of the estate as insolvent, and to save the expenses of a sequestration, passed, *inter alia*, a resolution, which was signed both by defendant and by Davis, that the estate should be assigned to the said Trust and Assurance Company, to be administered by them for the general benefit of the creditors,—that the Secretary of this Company thereupon assumed the administration of the estate, and proceeded to act in execution of the resolution,—that in consequence of some of Manuel's creditors refusing to consent to this arrangement, the deed of assignment was not executed by Manuel, and on the 8th of April he executed a general power of attorney in favour of Eaton to act for him,—that the sale was made by Eaton, acting solely under this power of attorney, on the 10th April,—that the assignment was never executed,—and that on the 26th April, Manuel's estate was placed under sequestration in consequence of a voluntary surrender by him.

Plaintiff closed his case.

Defendant put in the two promissory notes mentioned in the pleadings.

Plaintiff admitted that they were signed by Manuel, but nothing else.

Defendant closed his case.

After *Brand*, for the plaintiff, had commenced to sum up his case, a question occurred whether, from the form of the pleadings, the plaintiff must be held so to have denied that defendant was the legal holder of the note of £29 1s. 7d., and had acquired it before the sequestration of Manuel's estate, as to make it necessary for the defendant to prove the facts.

The plaintiff maintained the affirmative and the defendant the negative of the question; and the defendant proposed, if the question should be decided against him, now to call evidence to prove these facts.

Brand objected that it was not competent for defendant, after closing his case, to call any further evidence.

The Court were of opinion that it was necessary for defen-

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dant to prove the facts in question to support his plea as to the note for £29 9*s.* 7*d.*

The Court held it was in their discretion to allow the evidence offered to be adduced or not, and under the circumstances of the case allowed the defendant to call his evidence. (*Vide Tidd's Practice, p.* 509.)

Defendant called Isaac Manuel:—I passed this note for £29 9*s.* 7*d.* to Davis & Nathan for value. The endorsement is in the handwriting of Davis. Neither of them is now in the Colony.

Defendant closed his case.

Plaintiff, in replication, called Louis Berrangé:—I am clerk in the South African Bank. This note was discounted in that bank on the 19th February last. I have referred to the books of the bank for the date. It was discounted by Davis & Nathan. It was payable on the 26th May, and it was paid to the bank by Davis & Nathan, on the 25th of May (the 26th being a Sunday), by the cheque now produced by me, signed by Davis & Nathan. It remained in the bank till so paid.

Thomas Christian:—I am cashier of the Cape of Good Hope Bank. The note for £57 11*s.* 9*d.*, dated 26th January, 1844, now shown me, was discounted by Mr. Jearey on the 13th February, 1844, and paid when due on the 25th May, by Mr. Norden, the defendant. [This note had been blank endorsed by defendant.]

Plaintiff closed his case.

Brand maintained that the note for £29 had been proved to have come into defendant's possession subsequent to the sequestration. 2nd. He argued in support of his objection that defendant had not duly proved his debt on those notes under the 27th section of Ordinance No. 6, 1843. 3rd. He maintained that there was a distinction between this case and that of *Smith's Trustee* vs. *Norden* (Vol. II, part 2, p. 42), because here the sale of the house must be considered as having been made by Manuel's creditors, and not by Manuel himself; consequently, there was no *concurrentia debitorum inter easdem personas.* Manuel, although the debtor on the notes, was not the creditor for the purchase money. 4th. He maintained that even as to the note for £57, the defendant was not a creditor of Manuel at the date of the sale, having endorsed it away, so that it had been discounted in February by Mr. Jearey, a third party, who was the creditor at the date of the sale. 5th. That there was, at the date of the sale, or at the date of the sequestration, no *concurrentia debitorum*, because the note was not due, and payment of it could not have been demanded until

the 26th May, while the instalment sued for was due *instanter* on the sale, *i.e.*, on the 10th April.

The *Attorney-General* argued *contra*, quoted 13 *Vesey jun., ex parte Wagstaff, p.* 55; *Stephen's Nisi Prius, vol.* 1, *p.* 682; and maintained that under the words *mutual credit*, in the 28th section of Ordinance No. 6, 1843, acceptances by the insolvent, although not due until after the sequestration, may be set off against debts due to the insolvent by the payee in the acceptance, before the sequestration.

The Court were of opinion that the defendant's plea of compensation on the note for £57 11*s.* 9*d.* was good, but on the note for £29 9*s.* 7*d.* was bad, as, with respect to it, defendant could neither be said to have given credit, nor the cause of his debt to have accrued, until after the order of sequestration had been made; and, consequently, it was cut down by the 28th section of the Ordinance. And gave judgment for plaintiff for £484 1*s.* 7*d.* Each party to pay his own costs.

The Court held that neither the meeting of the insolvent's creditors, the then state of his affairs, the resolution agreed to by the insolvent and his creditors, and among them the defendant, on the 12th March, nor the fact that the sale had been made by Mr. Eaton under the power of attorney from the insolvent, had the effect of making any distinction between the defendant's right to plead compensation in this case and that which he would have had if the insolvent had himself, without the intervention of any trustee or attorney, sold the house bought by the defendant by auction, at a time when both the insolvent and the defendant knew that the estate of the insolvent was insolvent, but under such circumstances as to bring the transaction of sale and purchase under the protection of the 86th section of Ordinance No. 6, 1843.

That the 28th section of said Ordinance sustained the right of every creditor to plead compensation after the surrender of the insolvent's estate, in respect of any debt due by the insolvent to him, and against any debt due by him to the insolvent, in respect of and against which he might have pleaded compensation in a question with the insolvent, if he had been solvent, provided the creditor "*when such credit was given, or when the cause of his debt accrued*, had not notice of the order for sequestration having been made, or of any act of insolvency, in virtue of which such order shall have been made."

That here credit had been given by the defendant on the note for £57 11*s.* 9*d.*, and consequently the cause of this debt had accrued on the 26th January, 1844, when he

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received it from the insolvent. And even if it should be held that the words "*when such credit was given*" should be construed to apply not to the date of the creditor's debt, when it is prior in date to that against which compensation is pleaded on it, but to the date of the debt incurred by him to the insolvent which occasions the *mutuality* of credit (a question on which the Court expressed no opinion), —yet here the date of the debt which occasioned the *mutuality* of credit was, at all events, the 10th April, the date of the sale; consequently, when the credit had been given and the cause of the debt had accrued, the defendant could have had no notice of the order of sequestration which was not made until the 26th of April; nor, as the surrender was a voluntary one, of any act of insolvency in virtue of which it had been made.

That the cause of defendant's debt must be held to have accrued on the 26th January, 1844, the date of the bill, and not merely on the 25th May, 1844, when, by paying it to the bank, into whose possession, by reason of the endorsation, it had come, he got it back. And, although, by reason of the note being in possession of the bank, and not being payable on the 26th April, when the order for sequestration was made, it should be held that the *concurrentia debitorum* necessary to found the plea of compensation had not taken place until after the defendant had notice of the order of sequestration having been made: yet the restrictive provision in the 28th section of the Ordinance refers solely to the period when the credit was given, or the cause of the debt accrued, and not to the period when the *concurrentia debitorum* took place. As the effect of the surrender was to make the bill, although not payable until 25th May, 1844, be deemed in all questions under the sequestration as if it had been payable on the 26th April (*vide Pothier, vol.* 1, *p.* 133, § 234; *Woutersen's Executors, q.q. Palmer,* vs. *Nisbet and Dickson, 15th December,* 1829, *vol.* 1, *p.* 417) ; and as the note, while still in the hands of the bank, may be considered as constituting a debt due to defendant upon a contingency, and consequently falling under the provisions of the 31st section of the Ordinance, it might, if necessary, have been argued that the *concurrentia debitorum* took place *semel ac simul* with, and not after the order for sequestration had been made.

The Court held that the replication, in so far as founded on the debt, not having been proved in the estate, was untenable.

HIDDINGH, TRUSTEE OF MANUEL, *vs.* EATON, SECRETARY OF THE CAPE OF GOOD HOPE TRUST AND ASSURANCE COMPANY.

The Court held that a person,—although knowing himself to be insolvent, and even contemplating a surrender of his estate,—and although his insolvency is known to those with whom he deals or contracts,—may still lawfully dispose of and administer his property, so long as his estate is not placed under sequestration, in any way which he may consider to be most advantageous and expedient, provided he do nothing which is deemed fraudulent by law, or which is in contravention of the Insolvent Ordinance, or of any other Ordinance;—his creditors, however, if they shall think he is doing so in a wanton and reckless manner, likely to prove injurious to them, have it in their power to apply for an interdict to restrain him; and therefore that all contracts made with third parties bonâ fide for their assistance in the administration of his estate before his sequestration, at a fair and reasonable rate of remuneration to those parties for their trouble, will be valid. But on the other hand, that an insolvent under such circumstances cannot, under pretence of procuring the assistance of third parties in the administration of his estate, enter into a contract with such parties, they knowing him to be insolvent, to pay them for their assistance such an exorbitant remuneration as will amount in fact to an alienation in their favour of part of his assets, without any just or valuable consideration received for the same.

1844. Dec. 17. 1845. Jan. 11. Feb. 11.

Hiddingh. Trustee of Manuel, *vs.* Eaton, Secretary C.G.H.Trust and Assurance Co.

On the 12th March, I. Manuel, at a meeting of his creditors called by him, laid before them a statement of his affairs, which it was admitted by all parties, clearly proved that he was on that day irretrievably insolvent to an amount of above £8,000.

It was then resolved, *inter alia*, by the creditors present that Manuel should assign his estate in trust to the Cape of Good Hope Trust and Assurance Company, with the assistance of Mr. Barry, in the disposal of the property at Swellendam, for the general benefit of his creditors. That Manuel do aid and assist the said trustees in winding up his said estate; that the trustees be allowed five per cent. on the sale of movable property, and two and a half per cent. on fixed property; and that they allow to Mr. Manuel one half of the five per cent. on the sale of said movable property.

These resolutions were signed by the creditors present.

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Thereupon, the defendant immediately, with the knowledge and consent of Manuel, entered on the administration of his estate, and, with his assistance, sold all the movable property in Cape Town in the course of the month of March, and, with the assistance of Mr. Barry, all the movable property in Swellendam on the 8th of April.

In consequence of some of the creditors refusing to consent to the above arrangement, no assignation in trust was executed by Manuel; but on the 8th April he executed a notarial deed reciting the above facts, by which he appointed the defendant to be his attorney for him, and in his name, and for and on behalf of his creditors, to sell and dispose of his immovable property, and such part of his movable property as was yet unsold, with all dispatch.

All Manuel's property, movable and immovable, was sold by the defendants previously to the 11th April; and on the 26th April, Manuel, being pressed by some of his creditors, who had not consented to the above arrangement, surrendered his estate as insolvent, and thereafter the plaintiff was duly elected trustee of that estate.

The defendant thereafter rendered to plaintiff his account with the estate of Manuel, in which he took credit for the following items, which were objected to by the plaintiff, viz.:—

Paid J. Barker (law charges)	£32	14	0
Do. Manuel	60	0	0
Commission on sale of immovable property	245	4	9
Do. on sale of stock-in-trade in Cape Town	137	9	10
Do. do. on do. Swellendam	146	1	8

The defendant having refused to pay the amount of the above items, this action was brought by plaintiff to recover it.

It was proved at the trial by Mr. Eaton, the nominal defendant, that he attended the second meeting of the creditors under the sequestration, and that on the part of the Trust Company he offered to complete all that was necessary to be done for the completion of his administration of the estate, without making any further charge. At that time all that remained to be done, was to transfer eight lots of immovable property to the purchasers, to receive the price thereof, to pay the amount of the mortgages thereon to mortgagees, and the balance to the next preferent creditor. There was also £5,000 of promissory notes obtained from the auctioneer for the proceeds of the movable property, which defendant had handed over to Manuel, to be given up to plaintiff under the sequestration, which it was only requisite to pay short into the bank.

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The plaintiff admitted that there were only three creditors, whose debts amounted in all to £830, who had proved debts, whose debts were still unpaid, and who had not signed the resolution of the 12th March; and passed from all objections to the charges claimed by defendants, which in the declaration had been founded on allegations that the defendants' mode of administering the estate had been an improper one, or that they had charged more for their trouble than they could reasonably have demanded on that account from Manuel, if he had been solvent, and also from the objections made to the two items of payment of £32 14*s.*, and £60 to Barker and Manuel. It was also admitted that the two and a half per cent. on the sale of the Cape Town stock, to which Manuel was entitled under the resolution of 12th March, had been, or would be, paid over to plaintiff.

Brand, for plaintiff, maintained that Manuel, being an insolvent, was not entitled on the 12th of March, much less on the 8th April, to enter into the arrangement then entered into with the defendants, because it was one which must have had the effect of reducing his assets by the payment of a commission, to the defendants, which was unnecessary and enormous.

Ebden followed on the same side, and maintained that for their administration under the resolution of the 12th March, and the power of attorney of the 8th April, the defendants are not entitled to charge anything, because the contract with Manuel was an illegal one, being entered into when Manuel was insolvent, and known by defendants to be insolvent.

That the resolutions were put an end to by what subsequently happened, and never bound the creditors who had not signed; and therefore that the defendants cannot charge for anything done by them under and in pursuance of the resolution to which the creditors for whom the objection was now made had never consented.

The *Attorney-General* argued *contra.*

The Court held that the contract which had been made by Manuel with the defendants publicly, with the full knowledge and consent of a majority of his creditors, to do that which must otherwise have necessarily been done by his trustees, after his sequestration, was not objectionable, on the ground that both Manuel and the defendants knew him to be insolvent when the contract was made; but that as the creditors on whose account the plaintiff had brought this action had not, in common with the other creditors, sanctioned the arrangement in question, they were entitled to set it aside, in so far as they could

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prove that the remuneration stipulated for, and now claimed by the defendants, was—with reference to the expense which the trustees would have been allowed for doing, after the sequestration, that which defendants had done before it—extravagant and exorbitant; and as they alleged that this was the case, the Court referred to the Master to report whether the commission charged by defendants on the sales effected by them appears to be so unfair and unreasonable as to require further investigation; and if so, to investigate the same, and report what reduction, if any, should be made on the said charges, having in consideration and with reference to the compensation which would have been chargeable and allowed to the trustees on that account under the sequestration.

Postea (11th January, 1845),—The Master reported that the charge for commission on sales effected by the defendant is not so unfair and unreasonable as to require further investigation; but that the same is fair and reasonable, and a just compensation for the sales effected by him.

Postea (11th February, 1845).—With reference to the claim of the plaintiff for £73 0*s.* 10*d.*, being half of the commission of five per cent. upon the sale of the stock at Swellendam, which he alleged the defendants stipulated to pay to Manuel, and to which, therefore, as trustee, he claimed right, the plaintiff put in the examination *de bene esse* of B. Norden, which went to prove that Manuel was to have no claim to any commission or percentage on the sale of the Swellendam stock; and called Issac Manuel, who swore:—"I was to get two and a half per cent. on the amount of the sale of the Cape Town Stock, and Barry was to get two and a half per cent. on the amount of the sale of the Swellendam. I was not to get any part of the commission on the Swellendam estate."

The Court gave judgment for defendants, with costs.

CHASE, TRUSTEE OF STRETCH, *vs.* NIEKERK.

Ordinance 6, 1843, §§ 50, 54.

Trustee: continuation of action by, how to be effected. Provisional sentence. Practice. Record.

It is necessary, to entitle a trustee to continue in his own name process commenced in the name of a person who has surrendered his estate, that such trustee shall thereafter apply, by suggestion, to the Court for substitution of his name on the record. No notice, to the defendant, of such application is necessary.

1845. Jan. 13.

Chase, Trustee of Stretch, *vs.* Niekerk.

Mr. Stretch had taken out, and caused to be duly served on the defendant, a summons for provisional sentence for a debt due to him by defendant. On the 22nd August, 1843, when the case was called on in Court, the Court stayed the provisional proceedings, in consequence of Stretch having a few days previously surrendered his estate as insolvent; a trustee not having been then elected. Mr. Chase was thereafter duly elected and confirmed as trustee in Stretch's estate, and, in virtue of the 50th section of Ordinance No. 6, 1843, duly served the defendant with a notice to show cause why provisional sentence should not be granted against him on the above-mentioned summons.

The defendant did not appear. After consideration of the point, the Court held that it was necessary, to entitle the trustee to continue in his name the process in this case, that on a suggestion of the insolvency of Stretch, and of defendant's appointment and confirmation as his trustee, the Court should allow the name of the trustee to be substituted as plaintiff in the place of Stretch on the record (*vide* Ord. 6, 1843, § 54), but that it was not necessary for the trustee to give the defendant notice of his intention to make such suggestion and application to be substituted; and, on production of the confirmation of Chase's election as trustee, ordered that his name be substituted as plaintiff in the place of Stretch, by an entry to that effect in the summons; and thereafter granted provisional sentence against the defendant, as prayed.

MEYRING *vs.* BLACK AND ANOTHER.

Ordinance 6, 1843, §§ 17, 18.

Compulsory sequestration: adjudication of.

Rule of Court 148; *construction of.*

Any creditor having a sufficient interest to prevent a compulsory sequestration, may appear and oppose the application for having the sequestration adjudged, although the debtor himself does not appear. No notice of intention to dispute the act of insolvency need, however, be served on such creditor: such notice is only necessary to the debtor himself.

1845. July 12. Aug. 12.

Meyring *vs.* Black and Another.

On the 4th June, 1845, the estate of David Black was placed under sequestration by the Chief Justice on the petition of P. J. Meyring, setting forth that Black was indebted to him in £150 on a mortgage bond executed in favour of the petitioner by Black on the 19th February, 1845, and setting forth, as the act of insolvency, "that the said P. Black has for some time now last past absented himself from his residence at Worcester aforesaid, and did, on or about the 10th May last, depart from the Colony, and remained absent therefrom, with intent to defeat or delay the petitioner and others his creditors in obtaining payment of their debts to them due and owing."

This petition was supported by an affidavit of the verity of the debt.

A summons was taken out by the petitioner, calling on Black, in the usual form, to appear before the Court this day to show cause why his estate should not be adjudged by the Court to be sequestrated.

The return of the Sheriff set forth that he had repaired to the late residence of Black in Worcester, and in his absence served the summons, and delivered a copy thereof to his wife, when he received for answer—"My husband departed from this Colony for Scotland on the 10th May last." And that he had, on the 13th June, caused a copy of the summons to be inserted in the *Government Gazette* of that day, and another copy thereof to be affixed on the outer door of the Supreme Court in terms of the 17th section of Ordinance No. 6, 1843.

This day, *Brand*, for Meyring, moved the Court to adjudge the sequestration. Black was called, but no appearanco was made for him. Whereupon *Ebden*, for Landsberg, a creditor holding a judgment against Black, on which a writ had been taken out, the execution of which had been stayed by the

sequestration, opposed the motion on the ground that the allegation of the act of insolvency was untrue, and that Black had obtained leave of absence from Government, and that the petitioner had consented to his leaving the Colony on certain conditions.

Brand maintained, first, that no creditor was entitled to appear and oppose the application for having the sequestration adjudged when the debtor himself did not appear. But the Court held that a creditor, having such an interest to prevent the sequestration, as Landsberg had in virtue of his judgment, was entitled, under the 18th section of Ordinance No. 6, 1843, to oppose the adjudication. *Brand* next maintained that, by virtue of the 148th rule of Court, as no notice had been served by the debtor on the petitioner of his intention to dispute the act of insolvency alleged in the petition, that fact must be held as proved, and the petitioner could not be required to prove it. But the Court held that it was only against the person summoned *i.e.*, the debtor himself, that the facts of his intention to dispute which he did not give due notice should be held as admitted. *Brand* next maintained that, although the attorney of Landsberg had written a letter to the attorney of the petitioner, stating that he would move the Court to require such proof of the act of insolvency, and to supersede the sequestration, or delay the adjudication thereof; yet, as this letter was only written and delivered yesterday, it was not a sufficient notice to make it necessary for the petitioner now to prove the act of insolvency, and that the opposing creditor must be held bound to give notice of the disputed facts in the same way that the debtor must have done.

The Court held that the 148th Rule applied only to the debtor himself, and delayed the further consideration of the case until the 1st day of next term, to enable the petitioner to prove the act of insolvency.

Postea (12th August, 1845).—*Brand*, for Meyring, stated that the petitioning creditor did not intend to proceed further with the sequestration, and, on his motion, the Court superseded the sequestration. Costs to be paid by Meyring to Landsberg, the opposing creditor.

In re Holtman.

Ordinance No. 6, 1843, §§ 62 and 64.

Where an insolvent has been committed for trial on a charge of fraudulent insolvency, and is brought under examination before a Commissioner of the Supreme Court, he can only decline to answer questions having a tendency to prejudice him on his trial. If he does not answer questions having such a tendency, and refuses to be sworn, generally, it is the duty of the Commissioner to commit him for contempt.

Commissioner, jurisdiction of Supreme Court over, after his appointment.

Insolvent, under examination before Commissioner, is not of right entitled to assistance of counsel. As a matter of favour, the Court will permit the interference of counsel under such circumstances, to ask certain questions on behalf of the insolvent.

1845.
Nov. 25.
Dec. 2.

In re Holtman.

J. H. Holtman, after having surrendered his estate as insolvent, had been committed by the Resident Magistrate of Cape Town for trial on a charge of fraudulent insolvency. Thereafter, the trustee in his estate, under the provisions of the 62nd section of Ordinance No. 6, 1843, obtained the summons against the insolvent for his examination before the Registrar of Court, as a commissioner of Court.

On the day fixed for his examination, the insolvent appeared before the commissioner attended by his counsel (*Ebden*), and, before being sworn, stated that he refused to answer any questions relating to his trade, dealings, or estate, on the ground that such questions, if put to him, would not be lawful, in respect that he stood committed for trial on a charge of fraudulent insolvency, and that his answers would, or might, have a tendency to prejudice him on his trial.

The commissioner did not think fit to decide on the validity of this objection, and did not swear the insolvent, or proceed with his examination, but suggested an application to the Court, which was agreed to.

Brand, for the trustee, therefore, in order to bring the question before the Court, this day moved that the Court should of new order the insolvent to be examined.

After hearing counsel,

The Court held that as there might be many questions relevant to his estate which would not have the slightest

tendency to criminate him, or prejudice him on his trial, he was not entitled to refuse generally to be sworn, or to answer every question which might be put to him; and that in respect of such his refusal, it was the duty of the commissioner, under the provisions of the said 64th section, to have committed him to prison.

The Court also held that the prisoner could not lawfully refuse to answer every question which might be put to him, which, with reference to the proviso at the end of section 28 of Ordinance 72, would not be admissible evidence in any prosecution against him.

MENZIES, J., held that the Court had jurisdiction over the commissioner peremptorily to order him to proceed with the examination, and to commit the insolvent if he refused to answer the question put to him.

The other Judges were strongly impressed that the Judges in this matter had only the power to act ministerially under the Ordinance, and, therefore, had no such jurisdiction over the commissioner.

On hearing the opinion expressed by the Judges, *Brand*, for the trustee, withdrew his application, it being understood that the commissioner would forthwith go on with the examination under the summons already obtained against the insolvent, and proceed thereon according to law.

Postea (2nd December, 1845).—At an adjourned examination of the insolvent, *Ebden* appeared as counsel for the insolvent, advised him not to answer a particular question put to him by *Brand*, as counsel for the trustee,—and was proceeding to address the Commissioner (Mr. Bowles) to show that there was a legal objection to that question being put to the prisoner. Upon which *Brand*, for the trustee, objected that the insolvent was not entitled, as a matter of right, to the assistance of counsel, and that even if he had a right to have a counsel present to advise him, that counsel was not entitled to do more than privately communicate his advice to his client, and not to address the commissioner, or otherwise interfere in the proceedings.

The commissioner being unwilling to take on himself to decide this question, the examination was adjourned, and this day *Brand* and *Ebden* argued the question before the Court.

The Court held that they had no jurisdiction over the commissioner, in virtue of which they could give any decision on the present application which would be imperative on the commissioner. But that if the commissioner had refused to hear the insolvent's counsel, the insolvent had refused to answer the question, and the commissioner

1845. Nov. 25. Dec. 2.

Holtman.

had committed the insolvent to prison,—and if, thereupon, the insolvent had applied for his liberation as having been illegally committed, the Court could have tried the question whether it was lawful for the commissioner to commit the insolvent for such a refusal, without first hearing what his counsel had to urge against it.

The Judges, at the same time, expressed their opinion that the insolvent had no legal right to insist on being allowed the advice or assistance of a counsel, but intimated that in the case of any insolvent being examined under the provisions of the 62nd section of Ordinance No. 6, 1843, before the Court, or any Judge thereof, they would be inclined, as a matter of favour, to permit the interference of counsel in favour of the insolvent to the extent mentioned in the following passage in *Henly on Bankruptcy*, page 90:—"It was formerly considered that the attendance by counsel on behalf of a witness was grantable as a matter of favour on the part of the commissioners, and not demandable as a matter of right. But at present this is never refused; and probably never will. So also the party under examination should be permitted to take any note of the examination, and it has been usual to permit counsel attending on behalf of the party examined to ask such questions which, in the judgment of the commissioner, will elicit the whole account of a transaction left imperfect by the answers given to the examining party, or set right any misapprehension which such answers may give rise to."

Brink *vs.* De Lima.

Ordinance No. 6, 1843, § 4. *Act of insolvency.*

Compulsory sequestration, adjudication of, refused, and provisional order for, superseded, where such order was obtained on a return to a writ of execution sued out on a superannuated and unrevived judgment.

Refusal of an insolvent to point out property in satisfaction of such writ is no act of insolvency under Ordinance 6, 1843, § 4.

Superannuated sentence.

1846. Jan 12.

Brink vs. De Lima.

On the petition of the plaintiff, the estate of the defendant had been placed under compulsory sequestration by the Chief Justice on the 11th December, 1845.

1846. Jan 12.

Brink vs. De Lima.

The only act of insolvency set out in the petition was that he, the said defendant, having against him a judgment of the Resident Magistrate of Cape Town, bearing date the 2nd December, 1840, &c., and being thereunto required, did not point out to the acting messenger of the said Court, charged with a writ issued out of the office of the Resident Magistrate for Cape Town on the 2nd January, 1845, for £6 17*s.* 10½*d.*, being the amount of the said judgment, any disposable property to satisfy the same, or any part thereof, —did thereby commit an act of insolvency.

The defendant was summoned this day to show cause why his estate should not be adjudged to be sequestrated, when the *Attorney-General*, for the defendant, moved to have the order of sequestration set aside, on the ground that there was no sufficient act of insolvency proved to have been committed by the defendant, in respect that as the judgment of the Resident Magistrate had become superannuated by the lapse of more than a year from its date, without any proceedings having been had thereon, and having never been revived, no writ of execution could legally be issued in respect of it; and, consequently, that the refusal of the defendant to point out property in satisfaction of an illegal writ, and of a judgment which could not at the time be legally enforced, was not an act of insolvency under the provisions of Ordinance No. 6, 1843, section 4.

And so the Court held and adjudged the order of sequestration to be superseded, and the petition to be dismissed, with costs.

In re Buyskes.

Ordinance No. 6, 1843, §§ 117, 122. *Insolvent's certificate. Trustee.*

Effect of insolvent trustee's certificate.

The fact that an insolvent had not, in his capacity as trustee of an insolvent estate, paid over money to a creditor in that estate, is no ground for withholding his own certificate, inasmuch as notwithstanding the allowance of such certificate, his liability continued.

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The *Attorney-General* moved to have the certificate of the insolvent allowed.

Brand, for the Widow Munnik, referred to section 122

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of Ordinance No 6, 1843, and opposed the allowance of the insolvent's certificate, in respect that the insolvent had been trustee of an insolvent estate in which the widow was a creditor, and was still indebted to said estate in respect of money belonging to it improperly retained or employed by him.

But the Court held that this was not a ground for refusing allowance of the certificate; the provision of the Ordinance being merely that if such an insolvent trustee did obtain the allowance of the certificate, he was not thereby discharged, as to his future effects, in respect of the debt due to the estate of which he had been trustee.

Brand, for Thomas Sutherland, opposed the motion made by the *Attorney-General* for the allowance of the insolvent's certificate; and put in the affidavit of Thomas Sutherland, setting forth that he had been induced to discount, for behoof of the insolvent, on the 11th January, 1843, a promissory note made by the latter for £41 13*s.* 4*d.*, in consideration of receiving cession of a certain mortgage bond, in favour of the insolvent, which, *ex facie*, was a *kusting brief*, and, as such, entitled to the first preference over the property therein mortgaged, and on the faith that it was so. That, after the insolvent had surrendered his estate, he, Sutherland, had discovered on inquiry at the Registrar of Deeds' office, that the insolvent had, on the 22nd July, 1842, waived and postponed his preference on the said *kusting brief* in favour of the second mortgage of the said property, in consequence of which he, Sutherland, would receive nothing in respect of the said *kusting brief*. *Brand* maintained that by concealing the waiver of preference which the insolvent had granted, and offering in security cession of the bond as if it still possessed its preference as a *kusting brief*, the insolvent had fraudulently deceived Sutherland, who was therefore entitled to call on the Court, in exercise of the discretion given to it by section 117 of Ordinance 6, 1843, to refuse the insolvent's certificate.

The Court granted the certificate, but only on condition that the insolvent should not thereby be discharged, as to his future effects, in respect of his said debt to Sutherland.

VAN DER POEL *vs.* LANGERMAN.

Ordinance No. 64, § 4. (*No.* 6, 1843, § 4.)

Compulsory sequestration, application for.

The word "property" in section 4, *Ord.* 6, 1843, *includes immovable as well as movable property; and where the creditor who prays the sequestration is the first mortgagee, the immovable property of the debtor is "disposable" by the creditor in satisfaction of judgment on his bond.*

The debtor need not in such case point out to the Sheriff's officer the hypothecated real property, since the plaintiff's bond informed him of it. The creditor, where the return on the movables is sufficient, should sue out a writ attaching the immovable property, and proceed to dispose of it by judicial sale.

1846. Aug. 27. — Van der Poel *vs.* Langerman.

On the 13th July, 1846, the plaintiff recovered provisional sentence against the defendant for £1,500 upon a mortgage bond. The summons did not claim, and the sentence did not adjudge, that the mortgage should be executable. The plaintiff took out a writ against the goods and chattels of the defendant; the Sheriff's return to which was:

"The goods and chattels of the defendant have only produced £30 9*s.* 2*d.*, which I have ready for the plaintiff upon the within required security for restitution being given. I have found no other goods or chattels of the defendant's whereof I can cause to be made the deficiency of this writ, or any part thereof."

The plaintiff, upon the 18th August, 1846, presented a petition to have the estate of the defendant placed under compulsory sequestration; and in her petition and affidavit set out that by the mortgage bond which constituted her debt, certain landed property of the defendant, which was therein described, was specially hypothecated in security for the debt, and that she valued this security at £1,500. And also set out, as the act of insolvency committed by the defendant, that he had not, on being thereunto required, pointed out to the Sheriff's officer sufficient disposable property to satisfy the judgment against him.

Upon this petition, an order placing the defendant's estate under sequestration was made. The defendant was thereafter served with a summons, calling on him to show cause

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this day why his estate should not be adjudged to be sequestrated: and, having appeared, put in affidavits that the plaintiff's said mortgage bond was the first mortage of the property therein hypothecated, and that this property valued at the very lowest estimate, was worth considerably upwards of £2,000; and stating that he had offered, if the plaintiff would consent that the order should be suspended, immediately to dispose of the property by private sale, and discharge the plaintiff's debt.

The defendant therefore maintained that he was possessed of, and had pointed out, sufficient disposable property to satisfy the plaintiff's judgment; and that consequently, the order of sequestration must be suspended with costs.

The plaintiff maintained that by the words "sufficient disposable property to satisfy the same," in the 4th section of Ordinance No. 64, only movable property was meant.

But the Court held that the word "property" included *real* as well as movable property—(*vide Burton's Insolvent Law*, p. 44); that as the affidavit stated, and the plaintiff did not deny the allegation, that the property was worth upwards of £2,000, the defendant had shown he was possessed of sufficient property to satisfy the plaintiff's judgment; and that as the plaintiff held the first mortgage, not only was this property *disposable* for the satisfaction of that judgment, but that it could be disposed of by the plaintiff for that purpose, by attachment and judicial sale, as easily, and in as short a time, as under a sequestration of the defendant's estate.

That in this case it was unnecessary for the defendant to have pointed out the hypothecated real property to the Sheriff's officer, seeing that the plaintiff's own bond informed him of it; and that he ought, after the return made on the writ against the defendant's goods and chattels, to have sued out a writ for attaching the immovable property.

And on these grounds superseded the order of sequestration, and dismissed the petition, with costs.

In re Deneys.

Qualification of vote for trustee.

Ord. 64, § 37. (*Ord.* 6 *of* 1843, §§ 30, 31.)

Contingent debt. Proof of debt. Surety.

A surety and co-principal debtor having renounced the benefits of excussion and division, may be sued directly, without notice for demand on the principal debtor, on himself receiving the notice to which the principal debtor is entitled.

The insolvency of the co-principal debtor dispenses with the necessity of notice.

Creditors holding bonds in which the surety and co-principal debtor has so renounced the benefits are therefore not contingent creditors where the principal debtor has not surrendered or been excussed, but are entitled to prove immediately on the surety's insolvent estate, and to vote in the election of trustee.

1846. Nov. 16. *In re* Deneys.

In this case, *Brand*, for certain of the creditors, moved to have the election of Jurgens and Brand as trustees in Deney's estate confirmed.

The *Attorney-General* and *Ebden*, for other creditors, objected that the election was null, in respect that the votes of four creditors who had proved debts to the amount of £1,361 13*s.* 4*d.*, and voted for these trustees, were bad, in respect that they had proved upon bonds not yet due, secured to the full amount by special mortgages granted by the principal debtors in those bonds, and in which the insolvent was only a surety; and in proof that the full amounts of those debts were secured by the special mortgages, they referred to the proof of the debts of the four creditors objected to, in which they themselves valued those special mortgages at the full amount of the debts. They also quoted the Ordinance No. 64, section 47, and Ordinance No. 6, 1843, sections 30 and 31; and maintained that, notwithstanding the insolvent was bound in those bonds as co-principal debtor, and had renounced the *beneficia ordinis et excussionis*, yet in respect of his character of surety the debts proved under those bonds were only contingent debts, the contingency being the non-payment of the bond by the principal debtors. That these four creditors, therefore, were not entitled to vote in the choice of the trustee until this

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contingency should have happened, which it had not yet done, seeing that so far from the principal debtors having failed to pay, those creditors had not yet given the principal debtors three months' notice to pay, and consequently had not yet performed the condition which must be performed by them before they could demand payment from the principal debtors.

But the Court held that the debts due to the four creditors whose votes were objected to were not contingent debts. That a person who binds himself as surety and co-principal debtor with a renunciation of the *beneficia ordinis et excussionis* is, in a question with the creditor, precisely in the situation of principal debtor in every respect; except that, in his character of surety, he is entitled to claim the *beneficium cedendarum actionum*, and to found in defence against the claim of the creditor on any act done by the latter which prejudices the surety in the exercise of that *beneficium*, and therefore may be sued directly, without any demand, or even notice to pay, having been given to the principal debtor, on receiving the same notice that the principal debtor would have been entitled to. And that, as the insolvency of the principal debtor purifies the condition as to three months' previous notice to him, and entitles the creditor at once to claim on his insolvent estate, so the insolvency of the co-principal debtor has the same effect to give the creditor an absolute right to claim instantly on the insolvent estate of the latter.

There were other objections made to the votes of the creditors; but as it was admitted that, although they should all be sustained, Messrs. Jurgens and Brand would still have the requisite majority of good votes, the Court confirmed their election as trustees, with costs.

SUNLEY'S TRUSTEES *vs.* DE WET.

Ordinance No. 6, 1843, §§ 84, 86, 88, 89.

Undue preference.

"Contemplation of sequestration" under § 84 *defined.*

Forfeiture decreed under § 88.

What is not such a delivery or payment in the ordinary course of business as is protected by § 86.

When an insolvent knows that his estate must be sequestrated unless his creditors will accept a composition or give him time, he contemplates the sequestration of his estate.

Where L. made certain promissory notes in favour of S., and endorsed them to De W., and (the estates of L., S., and De W. being all surrendered), S.'s trustees caused the delivery of the notes to be set aside as an undue preference in an action against De W.'s trustees, and a forfeiture was decreed against De W.'s trustee. HELD, *that the amount of such forfeiture was the dividend to be received from L.'s estate, i.e., the actual and not the nominal value of the notes.*

1846. Nov. 24.

Sunley's Trustees vs. De Wet.

This action was brought by the plaintiffs, as the trustees in the insolvent estate of William Sunley, to have the plaintiffs declared to be entitled to the possession and property of three promissory notes, dated 15th June, 1846, made by one C. H. Leibbrandt, payable to the said Sunley, or order, the first for £300 at four, the second for £300 at six, and the third for £400 at nine months after date; in virtue of which the defendant had proved a debt in the insolvent estate of Leibbrandt,—to have the defendant's said proof of debt expunged,—and to have the plaintiffs declared entitled to prove the debt arising on the said promissory notes in the said insolvent estate; in respect that the said promissory notes had been blank endorsed and delivered by the said Sunley to the defendant at a time when Sunley was pressed and urged by divers of his creditors to pay the debts due by him to them,—when Dickson & Co., one of his creditors, had sued out execution against him for a large sum of money,—and when the officers of the Sheriff had seized and attached, or were engaged in seizing and attaching, his goods, whereof to levy the amount for which execution had been so issued. That such endorsement and delivery of the said notes was made voluntarily, through favouritism, *per gratificationem*, and with the intention to prefer the defendant before the other creditors of Sunley, who were then pressing and urging him for payment of their debts,—and was therefore an alienation made in fraud of creditors, and of which by the common law of the Colony restitution ought to be decreed. That the said endorsement and delivery was a transfer, or cession, made at a time when Sunley contemplated the sequestration of his estate as insolvent, and with the intent thereby to prefer the defendant before Sunley's other creditors, and was, therefore, an undue preference, and as such, null and void, under the provisions of the 84th section

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of Ordinance No. 6, 1843. That at the time when the defendant, by such delivery and endorsement of the said notes, received the said undue preference, such undue preference was received by him by or through a collusive arrangement, mutual understanding, or common consent, between the defendant and Sunley, the latter to give, and the former to get, such undue preference; wherefore, under the provisions of the 88th and 89th sections of the said Ordinance, the plaintiffs are entitled to claim that the defendant be declared to have forfeited, in regard to the insolvent estate of the said Sunley, the amount of said notes, or such other amount as this Court shall determine, and to be debarred from claiming or proving on Sunley's insolvent estate for any such amount as aforesaid.

The plaintiffs called Sunley, the insolvent, A. Beck and J. T. Geyer, the Sheriff's officers, E. Thompson, one of the trustees of Sunley; and the defendant called P. D. Hohne and H. D. Jenken, the clerk of Sunley,—by whose evidence it was proved that Sunley had been one of the partners of Hewson & Sunley, carrying on business in Simon's Town, and on the dissolution of that firm on the 11th October, 1845, took over the debts due by and the assets belonging to it, and commenced carrying on business on his sole account. That at its dissolution the said firm was insolvent, to the amount of £5,000 or £6,000. That between the 11th October, 1845, and the sequestration of Sunley's estate, on the 10th July, 1846, he had become indebted to the firm of Dickson & Co. to the amount of between £10,000 and £11,000.

That in June, 1846, Dickson & Co. and another creditor obtained provisional sentence against Sunley, the former for £2,000, and the latter for £450, in execution of which, writs were issued, in virtue whereof Beck, the Sheriff's officer, on the 12th June, seized and attached the goods of Sunley, in his shop and stores at Simon's Town, and placed the same under the custody of another officer.

That on his arrival at Simon's Town before making the seizure, Beck met the defendant, who lived in the next house to Sunley's shop, and who was then a creditor of Sunley's to the amount of more than £2,000. That the defendant asked Beck what he had come there for, and was told by Beck that he had come to attach Sunley's property, and had heard that Sunley was done up; whereupon the defendant shrugged his shoulders, and said, "I am afraid, then, I shall lose too."

That the officer Geyer went to Simon's Town on the 18th June to appraise Sunley's goods, which had been attached by Beck. That the valuation put by him on them

was about £2,900. That he shut and locked up Sunley's shop on the 18th, and the other stores as soon as the goods in them were valued and appraised.

That on the 19th or 30th June defendant met Geyer, who told him that he had come to value Sunley's stock. That defendant asked Geyer if he knew how Sunley's affairs stood; he replied that he did not. That on the morning of the 22nd June defendant asked Geyer how he had found defendant's stock; he replied that, from what he had heard, the stock would not cover the debts which Sunley owed, which he had heard amounted to £8,000.

That on the 15th June Sunley had received from Leibbrandt, who owed him about £4,000, the three promissory notes in question; and it was agreed between them that Leibbrandt, should give Sunley certain other notes for the balance, at twelve, eighteen, twenty-four, and thirty-six months, provided Sunley was in a situation to give him an extension of credit without committing himself. That Leibbrandt went to Cape Town to take legal advice as to whether Sunley would be correct in taking, in his then situation, notes at those long dates, and afterwards gave him notes for the balance at twelve, eighteen, and twenty-four months.

Previous to the 22nd, Sunley had been unable to take up two promissory notes, to the amount of £200 and upwards, which defendant, on Sunley's undertaking to take them up when due, had endorsed for Sunley's accommodation, which notes had been passed by Sunley to third parties, by whom they had been protested for non-payment, and were on the 22nd in the hands of the notary. That Sunley had also made, for value, in the course of trade, a note for £320 in favour of defendant, by whom it had been negotiated, and which became due on the 25th June.

That after the Sheriff's officer had attached Sunley's goods, he had left his own premises and lodged in the cottage of his clerk, Jenken. That on the 22nd, between 6 and 7 in the evening, defendant came into Jenken's room, where he and Sunley then were. That Sunley then expressed his regret to defendant that he had not been able to take up the accommodation notes which were then in the hands of the notary; and added that he would not be able to take up the note for £320 on the 25th. That the defendant appeared annoyed at this; upon which Sunley took out of his pocket the three promissory notes in question, and said that, in consequence of the execution of his premises, no promissory note made by him would be of any use to defendant, but that here were three promissory notes,

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by lodging which at the bank as security, or by discounting which, he might obtain money to enable him to take up the overdue notes, and that for £320 on the 25th, and that he might apply the surplus in payment of a balance of £450 which Sunley owed him on open account, and had promised to pay long ago.

That defendant strongly demurred to take the notes, and expressed his dislike to take them, and wished, instead of them, to have cash to assist him in taking up the notes. The defendant also asked Sunley if he, defendant, would be right in taking those notes. That Sunley told him he would, and that he, Sunley, thought and trusted he would in a short time get through all his difficulties. That defendant was at last persuaded to take the notes, which Sunley then endorsed and gave to him.

That on the 30th June, Sunley, who was then in Cape Town, was told by Mr. Hutchinson, the attorney for Dickson & Co., that he had taken out an interdict to prevent Sunley from disposing of the notes given by Leibbrandt. That Sunley, although he had only given away the three notes now in question, and had the others in his possession, told Mr. Hutchinson that the interdict was too late as he had already paid away all those notes. That Mr. Hutchinson replied that, if so, he, Sunley, would be transported. That Sunley, being alarmed by this remark, immediately sent off an express to Simon's Town, with a note to Mr. Jenken, desiring him to go to defendant, get back the notes, and send them up to him, Sunley. That the note neither stated any reason why Sunley wished to have the notes back, nor any purpose for which they were wanted. That Jenken went to the defendant, read the contents of the note to him, and asked him for the notes. The defendant at first demurred to giving them back, but on a verbal assurance from Jenken that if he gave back the notes they would either be held for him, or an equivalent be given to him; the defendant gave back the notes to Jenken without requiring or receiving any receipt for them. That the notes were sent up to Sunley, who, by Attorney Merrington's advice, left them with him to hold them for whom it might concern; by whom they were afterwards given to defendant.

Sunley swore that when he delivered the notes to defendant, he did not contemplate the sequestration of his estate; but at the same time admitted that he then saw no way of getting through his difficulties and avoiding the sequestration of his estate, except by his creditors accepting a composition of ten shillings in the pound, or giving him time.

After hearing the *Attorney-General* for the plaintiff, and *Ebden* for the defendant, the Court held that when an insolvent person knows that his estate must be sequestrated unless his creditors will accept a composition or give him time, he, according to the legal construction of the provisions of the Insolvent Ordinance, contemplates the sequestration of his estate. That when Sunley delivered the notes to the defendant he contemplated the sequestration of his estate, and intended thereby to prefer the defendant before his other creditors; that the delivery of the notes to the defendant was, therefore, an undue preference, and null and void under the provisions of the 84th section of the Ordinance No. 6, 1843. That this delivery of the notes to the defendant was not protected by the 86th section of the Ordinance, because it was not a delivery or payment made in the usual ordinary course of business, by reason, 1st, of the situation in which Sunley actually was, and was known by defendant to be, at the time; 2ndly, because even if it was considered to be a payment, it was made to discharge bills which were then lying overdue and protested, and a bill the term of payment of which was not come; 3rd, because these notes could not be considered as cash paid to defendant, but must be held to be merely a security *pro tanto* of the debt due to defendant, both on account of the situation in which the affairs of Leibbrandt the maker of them, and of Sunley the payee and endorser, then were; and as to two of them on account of their not being payable till six and nine months after date. That even if the transaction had been *ex facie* one in the usual course of business, it was not protected by the said 86th section, because there has been proved to have existed a common consent between Sunley and the defendant, the one to give and the other to get, a preference over the other creditors of the insolvent. And, consequently, that the defendant had incurred the forfeiture enacted by the 88th section of the Ordinance; but that the amount of the forfeiture was not the nominal but the actual value of the bills, namely, the amount of the dividend that should be received on them from the insolvent estate of Leibbrandt.

And gave judgment for the plaintiffs accordingly, with costs.

NORDEN *vs.* EXECUTORS OF NORDEN.

Ordinance No. 6, 1843, § 23, *effect of.*

1847. Aug. 21.

Norden vs. Executors of Norden.

In this case the plaintiff had prayed in his declaration that the defendants might be condemned, in their capacity as executors to pay a certain debt alleged to have been due to him by the deceased Norden, and to pay the costs in their said capacity; or failing that, in their individual capacity.

On the 19th August the Court confirmed the report of the Master, to whom the case had been remitted to report, and gave judgment for the plaintiff as prayed, with interest on £2,388 4*s.* 4½*d.*, from 7th January 1846, and costs.

When the Court gave this judgment, they had not been informed, by either party, that after the remit to the Master, the defendants had surrendered Norden's estate as insolvent. Nor had the plaintiff's counsel then noticed the claim in the declaration, that the defendants should pay the costs in their individual capacity.

This day, the *Attorney-General*, for the plaintiff, moved that a finding to this effect should be added to the judgment. But the Court, being now made aware of the surrender of the estate by the defendants previously to the date of the judgment, held that, in consequence of the provisions of the 23rd section of Ordinance No. 6, 1843, the Court had had no power to give judgment against the defendants for the debt on the 19th August; that this judgment was, therefore, null and void, and the action against the defendants, for the debt and costs in their capacity as executors, was put an end to by the surrender; and that, although this action might still subsist against them in their individual capacity, in so far as respected the claim for costs against them in the latter capacity, it was premature to consider the question as to their individual liability for the costs, before the question as to the liability of the estate for the debt claimed by plaintiff had been determined by a valid legal judgment in his favour, or by the admission of that claim by the creditors of the estate.

REDELINGHUYS'S TRUSTEES *vs.* RUSSOUW'S TRUSTEES.

Ordinance No. 6, 1843, §§ 85, 86. *Compensation. Undue preference.*

Section 86, *Ord.* 6 *of* 1843, *does not qualify section* 85 *in the same way as it qualifies section* 84.

Compensation not pleadable between a liquid present and a contingent debt.

1847. Dec. 18.

Redelinghuys's Trustees *vs.* Russouw's Trustees.

The declaration in this case set forth that, on the 20th November, 1846, Russouw endorsed a promissory note, bearing date 20th November, 1846, for £197 9*s.* 6*d.*, made by Redelinghuys in favour of Hamman, payable on the 20th March, 1847, at the request and for the accommodation of Redelinghuys, "and, in order to increase the security of the said promissory note, so as to enable Redelinghuys to turn it to his use and benefit by negotiating the same to the payee thereof;" and that the said note, "with the name of Russouw as endorser thereof, or surety for the payment of the same by the drawer or maker thereof, was by Russouw delivered to or left with Redelinghuys, who delivered the same to Hamman for valuable consideration." And that "afterwards, and before the said note had become due, to wit, on or about the 20th March, 1847," Redelinghuys, being then the lawful holder of a promissory note made in his favour by Morkel & De Villiers, for £197 9*s.* 6*d.*, bearing date 11th March, 1847, payable four months after date, endorsed and delivered the same to Russouw. That Redelinghuys, when he so endorsed and delivered this note to Russouw, contemplated the surrender of his estate as insolvent, and intended to benefit Russouw, who was then, as aforesaid, in law a surety for Redelinghuys in regard to the amount of the note of 20th November, 1846, by securing to Russouw the repayment of the amount for which he had, as such surety, rendered himself liable when he should be called on to pay the same. That the estate of Redelinghuys was sequestrated as insolvent on the 18th March, 1847, and the plaintiffs duly confirmed as trustees thereof on the 24th April, 1847. That the estate of Russouw was sequestrated as insolvent on the 30th April, 1847, and the defendants were afterwards duly confirmed as trustees thereof, and in that capacity obtained possession of the said note of the 20th November, 1846, as part of Russouw's insolvent estate. That on the 1st July, 1847, while the said note was so in the hands of the defendants, the plaintiffs demanded delivery of the same, as of right belonging to

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them in their capacity as trustees of Redelinghuys, the same having been ceded and endorsed as aforesaid by Redelinghuys as an undue preference of Russouw. That the defendants did not comply with this demand, but kept the note, and, as the holders thereof, afterwards, on the day when the same became due, received the amount thereof from Morkel & De Villiers. That the plaintiffs have requested the defendants to pay and hand over to them the amount of the said note so received by them, but the defendants have refused to do so. Wherefore the plaintiffs pray that the defendants may be condemned to pay to them the said sum of £197 9*s.* 6*d.*, with interests and costs of suit.

The defendants, in there plea, pleaded, first, the general issue; and secondly, should the plaintiffs succeed in proving the allegations in their declaration, and not otherwise,—they pleaded that the plaintiffs ought not to have or maintain their said action, because they say that at the time of the sequestration of the estate of Redelinghuys as insolvent, he was indebted to Russouw in the sum of £165 15*s.* 11¼*d.*, being the amount of a certain bill of exchange, bearing date the 18th January, 1847, payable on the 15th April, 1847, drawn by Russouw upon, and accepted by, Redelinghuys, in favour of Cauvin, without consideration, and for the accommodation of Redelinghuys, and which bill has not been paid by Redelinghuys, and has been duly proved by Cauvin in the estate of Russouw. And that the defendants are by law entitled to set this debt of £165 15*s.* 11¼*d.*, against the debt or demand of the plaintiffs, as trustees aforesaid. And that the defendants, on the 19th November 1847, tendered to the plaintiffs the sum of £31 13*s.* 6¾*d.* being the difference between the said sums of £197 9*s.* 6*d.* and £165 15*s.* 11¼*d.*, together with costs incurred up to the date of tender, which the plaintiffs refused to receive.

In their replication, the plaintiffs joined issue generally with the defendants on their said pleas.

The witnesses called by the plaintiffs proved, to the satisfaction of the Court, that Hamman had sold sheep, &c., to Redelinghuys, and, in payment for the same, the promissory note for £197 9*s.* 6*d.*, dated 20th November, 1846, was made by Redelinghuys, which it was agreed should be immediately discounted with one of the banks in Cape Town, as the terms of the sale had been cash. That Hamman offered the note for discount to the South African Bank, who refused it, without having thereon the name of an endorser residing in Cape Town. Hamman returned with the note to Redelinghuys, and asked him to get an endorser: whereupon Redelinghuys gave him the following note to Russouw, who was Hamman's brother-in-law, an

with whom Redelinghuys had previously had transactions by signing accommodation paper for each other:

"Good Hendrick,—Do me the pleasure to endorse the bill for your brother-in-law. In so doing you will oblige me.

"P. J. REDELINGHUYS."

"20th November, 1846."

Hamman and Redelinghuys both swore that Russouw's endorsation was asked for the accommodation of Redelinghuys, and not of Hamman.

Hamman took this note to Russouw, who put his name on the back of the note, which Hamman then took to the bank, and by their desire wrote his name above that of Russouw, and received the amount of the note from the bank.

Hamman swore that there was no agreement between him and Russouw, either that he should repay Russouw the amount of the note, if the latter was compelled to pay it; or that if Russouw was compelled to pay the note by the bank, he should have no recourse on Hamman.

Redelinghuys swore that, a few days before the 11th of March, Russouw urged him that before the 20th March, when the note became due, he, Redelinghuys, should provide for it by cash or another bill. That, in consequence of this, Redelinghuys got from Morkel & De Villiers, to whom in that month he had sold sheep to an amount of £455, the note of the 11th March, 1847, for £197 9*s.* 6*d.*, and another note for the balance. That he got this note for £197 9*s.* 6*d.* in order to give it to Russouw to provide for Hamman's note, and did give it, on the 11th March, to Russouw's son, to take to his father, who had been very pressing for it. That previous to the 11th March, Redelinghuys had summonses served on him for an amount of £2,113, which were to be called in Court on the 12th March; and on the 9th March had determined to surrender his estate immediately, and did so on the 18th, as soon as he could make out his accounts.

Redelinghuys did not recollect having on the 11th March, or previously, made know to Russouw that he was going to surrender his estate, or that his affairs were embarrassed, and knew of no other means that Russouw had, previously to the 11th of March, of knowing the state of his affairs, except that the summonses had been served on him on the 9th March, the report of which immediately spread and was known all over Cape Town. Mr. Steytler's evidence confirmed this, and also proved that the deficiency in Redelinghuys's estate was £12,000.

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Hamman swore, that on the 11th of March, Russouw showed him the note of Morkel & De Villiers for £197 9*s.* 6*d.*, and told him he had got it from Redelinghuys to pay and take up his note which fell due on the 20th November, 1846; that Russouw then asked him to give him £65 to assist him in doing so; that he had refused to do this, in consequence of which Russouw got angry and did not pay the note falling due on the 20th March, which he, Hamman, was obliged to pay to the bank two days afterwards; that he had not yet proved for this note in Russouw's estate.

It was proved by Redelinghuys that Russouw had accepted the bill in favour of Cauvin, for the accommodation of Redelinghuys, who had bought cattle to that amount from Cauvin.

After the plaintiff had closed his evidence, *Ebden*, for the defendants, moved for an absolution from the instance on account of the variance of the proof from the pleadings: 1st, on the ground that the plaintiffs had failed to prove that Russouw was surety for Redelinghuys, as alleged in the declaration, or that he had endorsed the note, "in order to increase the security of the said promissory note, so as to enable the said Redelinghuys to turn it to his use and benefit by negotiating the same to the payee thereof;" 2nd, because the endorsation of the note of Morkel & De Villiers to Russouw was alleged in the declaration to have been made on the 20th of March, 1847, which is contradicted by the evidence, which proved it to have been endorsed on the 11th March; and maintained that the time was here of the substance of the case, because to found this action in its present form it was necessary that the endorsation should have taken place before the 18th March, when Redelinghuys surrendered his estate. And quoted *Roscoe's Nisi Prius Evidence, p.* 66.

The *Attorney-General* argued *contra*, and on the second point quoted *Freeman* vs. *Jacobs*, 4, *Campbell, p.* 209, and 1, *Moodie's Crown Cases, p.* 98.

The Court refused the absolution from the instance.

They held that it had been proved, as alleged in the declaration, that Russouw had endorsed the note for the accommodation of Redelinghuys, and thus became surety for him; and that the words in the declaration above quoted, in inverted commas, were surplusage.

They held that, even admitting that time was here of the substance of the case, it could only be so with reference to the endorsation having taken place before the 18th of March; and that, supposing the date of the 20th of March to be specified with reference to the day on which the endorsation was made, and not merely as describing the

day on which the other note became due, which, to say the least, was very doubtful, yet that the allegation that the endorsation was made on or about the 20th March, was sufficient to comprehend an allegation that it had been made on the 17th March, and that the variance between an express allegation in the declaration that it had been made the 17th March and the fact of its having been made on the 11th, as proved by the evidence, would have been immaterial.

The plaintiff called no evidence.

The *Attorney-General* maintained that the endorsation of the note of the 11th March to Russouw was clearly an undue preference of him, under the provisions of the 85th section of Ordinance No. 6, 1843. That the provisions of the 86th section did not qualify or affect those of the 85th section, in the same way that they qualified those of the 84th section. That the plea of compensation was bad, and could not be set up to maintain the defendants in possession of the proceeds of a note which they, or the insolvent whom they represented, had obtained possession of as an undue preference, and, consequently, by an act which the law considers to be an illegal act.

2ndly. That Russouw or his trustees could not plead compensation in respect of a debt which, although Russouw or his estate may eventually be called on to pay as a surety for Redelinghuys, has not yet been paid, either in whole or in part, by Russouw or by the defendants,—which has been proved for by Cauvin on Redelinghuys's estate,—and which may possibly be paid in full by that estate. That such a contingent liability, even supposing it might afford ground for a plea of retention, afforded no ground for a plea of compensation, which, and not the right of retention, has alone been pleaded by the defendants in their plea.

Ebden, contra, maintained that the 86th section of the Ordinance did qualify the 85th section, and that Russouw's asking for, and obtaining from Redelinghuys, the note of Morkel & De Villiers, to secure him against being obliged to pay Hamman's note, was in the usual and ordinary course of business, and that proof of a common report of Redelinghuys's insolvency on and after the 9th March did not show the existence of some collusive arrangement, mutual understanding, or common consent, between the insolvent and Russouw. That Cauvin's proof of his debt on Russouw's estate was, in a question with Russouw's creditors, equivalent to Russouw's having paid Cauvin in full before his insolvency.

The Court held that the provisions of the 86th section did not qualify or apply to those of the 85th.

2ndly. That even if they had, the circumstances given in

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evidence proved that the endorsation of the note of Morkel & De Villiers to Russouw was not a transaction in the usual and ordinary course of business, and also proved the existence of a mutual understanding or common consent between Redelinghuys and Russouw, the one to give and the other to get thereby a preference over the other creditors of Redelinghuys.

3rdly. They held that the contingent liability of Russouw's estate for Cauvin's bill could not support a plea of compensation to the extent of its amount against the liquid claim of the plaintiffs.

4thly. They expressed a very strong opinion that neither a plea of compensation nor retention could be set up to maintain defendants in the possession of the proceeds on a note which they, or their insolvents, had got possession of as an undue preference, contrary to the provisions of the Ordinance No. 6, 1843, against a claim made by the trustees of the insolvent by whom the undue preference had been granted.

And gave judgment for the plaintiffs, as prayed, with costs.

LEEUWNER *vs.* MECHAU.

Rule of Court No. 148, *applied to Ordinance No.* 6, 1843, §§ 5, 17, *and* 18.

Compulsory sequestration, adjudication of.

1848. Jan. 12.

Leeuwner *vs.* Mechau.

On the 15th of August, 1829, the 148th Rule of Court was made by the Judges, with reference to, and for the purpose of carrying more beneficially into operation the provisions of the 12th, 24th, and 25th sections of the Ordinance No. 64, which had been passed on the 6th August, 1829. The Ordinance No. 64 was thereafter wholly repealed by the Ordinance No. 6, 1843, which, however, in sections 5, 17, and 18 thereof, re-enaced, *totidem verbis*, the provisions of the 12th, 24th, and 25th sections of Ordinance No. 64. The Judges had neither repealed nor re-enacted the 148th rule after the Ordinance No. 6 had been passed.

In this case, in which the debtor—whose estate had been placed under sequestration on the petition of one of his creditors—had neither delivered nor transmitted to the attorney of the petitioning creditor the statement required by the 148th Rule of Court, of any facts alleged in the summons which he intended to dispute.

Ebden, for the debtor, opposed the adjudication of the sequestration by the Court, on the ground that certain

necessary facts stated in the summons had not been proved; and maintained that, by virtue of the repeal of the Ordinance No. 64, the 148th Rule of Court necessarily became null, and ceased to have any legal effect.

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But the Court held that, as it had not been repealed by the Court, it continued in full force, and was now applicable to and regulated the proceedings under sections 5, 17, and 18 of Ordinance 6, 1843, in like manner as, previously to the repeal of Ordinance No. 64, it had applied to and regulated the proceedings of sections 12, 24, and 25 of that Ordinance; and that the debtor was therefore barred from disputing, and the petitioning creditor was not required to prove, any of the facts alleged in the summons. (See the somewhat analogous case of the Rules of Court 67, and from 81 to 92, both inclusive, and the Ordinances, No. 41, 83, and 84.)

Ross & Co. *vs.* Butcher.

Ordinance No. 6, 1843, §§ 84, 88.

Undue preference: mortgage bond set aside as constituting an. Forfeiture of claim under § 88, *refused.*

On the 28th July, 1847, J. F. Schierhout executed in favour of the defendant Butcher, as agent, and acting on behalf of Wollaston & Co., a mortgage bond, whereby he specially hypothecated a certain house and premises in Cape Town, and also bound his person and property in general in security to the said Butcher, on behalf of Wollaston & Co., of the sum of £937 8*s.* 9*d.*

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On the 11th August, 1847, the said Schierhout surrendered his estate as insolvent, and the said Butcher thereafter proved the said mortgage bond in the insolvent estate, and was by a liquidation account thereof framed by the trustee, and laid before the Master of the Court, awarded upon and by virtue of the said mortgage bond the sum of £303 16*s.* 1*d.*, being the entire residue of the said estate as then collected, remaining after the payment of certain other mortgage bonds of a prior date, thus leaving no assets available for the payment of any of the concurrent creditors of the said estate. The plaintiffs, being concurrent creditors, objected to the liquidation account in respect of the sum so awarded in preference to the defendant, and obtained leave to file a declaration against the defendant, wherein, by reason of certain facts therein set forth, and of the provision

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of section 84 of the Ordinance No. 6, 1843, the plaintiffs prayed that the said mortgage bond should be declared to have been an undue preference of the defendant, and therefore to be null and void; and further prayed that, by reason of the provisions of section 88 of the said Ordinance, the plaintiffs should be declared to be entitled to recover from the defendant, for the benefit of the creditors of the said insolvent estate, whatever amount he shall have received from or out of the said estate under and by virtue of the said mortgage bond; or, in case the sum so awarded to him shall yet be in the hands of the trustee, that the same should be declared to be distributable among the creditors of the said estate other than the said defendant; and, further, that the said defendant should be declared to have forfeited, in regard to the said insolvent estate, such last-mentioned amount, and to be barred from claiming or proving such amount as a debt against the estate.

The Court, in respect of the evidence adduced by the plaintiff, gave judgment for the plaintiffs, adjudging the said mortgage bond to be null and void under the provisions of section 84 of the said Ordinance.

But in respect it was proved that, in consequence of the plaintiffs having objected to the liquidation account before it had been confirmed by the Court, no part of the sum therein awarded to the defendant had ever been paid to or received by him, the Court held that the provisions of section 88 of the Ordinance did not apply to the case of the defendant, and therefore absolved him from the conclusion in the declaration founded on the provisions of that section.

Redelinghuys's Trustees *vs.* Morkel & De Villiers.

Ordinance No. 6, 1843, §§ 84 *and* 86.

Undue preference: claim to set aside delivery of certain bills as, refused, such delivery being declared in the ordinary course of business.

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The plaintiffs' declaration set forth that P. J. Redelinghuys, on the 8th March, 1847, endorsed, ceded, and delivered to the defendants, then being creditors of the said Redelinghuys, divers bills of exchange and promissory notes, of which he was then the lawful holder and owner, specified in the schedule annexed to the declaration, amounting in all

to the sum of £991 7*s.* 3*d.*, and also on the same day delivered to the defendant salt provisions of the value of £27 12*s.*, and that when the said Redelinghuys so made such endorsement, cession, and delivery, he contemplated the sequestration of his estate as insolvent, and intended thereby to prefer the defendants before his other creditors.

That on the 18th March, 1847, Redelinghuys surrendered his estate as insolvent, and that the plaintiffs had been duly confirmed as trustees of his insolvent estate; that the defendants had received the amount of the said bills and notes, and had refused to pay the same or any part thereof, or of the value of the said provisions to the plaintiffs, though requested so to do.

Wherefore the plaintiffs prayed that, under and by virtue of the 84th section of the Ordinance No. 6, 1843, the said alienations, cessions, and deliveries should be declared null and void; and that the defendants should be condemned to pay to the plaintiffs the said sums of £991 7*s.* 3*d.* and £27 12*s.* with interests and costs.

In their plea, the defendants pleaded, 1st, the general issue; and, as a further plea, should the plaintiffs succeed in proving the allegations in the declaration contained, but not otherwise, that the plaintiffs ought not to have their action against them, because, on or about the 1st January, 1847, a verbal agreement was entered into between the said Redelinghuys and the defendants, which was in full force up to the date of the insolvency of the said Redelinghuys, whereby it was agreed between them respectively, that in consideration of the payment from time to time by the defendants of certain debts due by Redelinghuys, and of the endorsement of certain notes by the defendants for his accommodation, he would from time to time deliver to the defendants certain supplies of provisions and outstanding bills and other securities due or to become due to him;— that in pursuance of the said verbal agreement the defendants did, from time to time, receive such provisions, bills, &c., and did, from time to time, pay such debts due by the said Redelinghuys, and become responsible for his notes as aforesaid; that the said bills, notes, and provisions in the declaration mentioned were, both prior to and upon the said 8th March, delivered to the defendants in pursuance of the said agreement.

And that the defendants did from time to time, both before and after the said 8th March, in pursuance of the said agreement, make certain payments (the particulars of which are specified in the account-current annexed to the plea) on behalf of the said Redelinghuys, upon the faith of

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the said bills, notes, and provisions, and have made such payments to much more than the full value of the same.

In their replication, the plaintiffs joined issue with the defendants.

At the trial, the plaintiffs admitted that certain of the items entered to the debit of the defendants as under date of the 8th March, 1847, in the account annexed to the defendants' plea, had actually been received by them from Redelinghuys previously to the 8th of March, the day on which the declaration alleged that the fraudulent endorsements, cessions, and deliveries had been made by Redelinghuys to the defendants; and restricted their claim against defendants to the amount of the following promissory notes, which the defendants admitted they had received from Redelinghuys on the 8th March,—which, after deducting discount for the time these notes had to run, was £661 10s. 10d., viz.:—

Searight's note	£300	0	0
Home, Eagar, & Co.'s note	200	0	0
Hurley's ditto	40	0	0
Hurley's ditto	36	0	0
Low's ditto	60	0	0
Bickersteth's ditto	25	14	10
Hutchinson's ditto	20	0	0
	£681	14	10
Deduct discount	20	4	0
	£661	10	10

The plaintiffs further admitted that the following items placed to the credit of the defendants in the account annexed to their plea, had been paid by defendants on account of, and the ninety-one sheep delivered to, Redelinghuys on and between the 8th and 11th of March, viz:—

Daniel	£150	0	0
Muller	50	0	0
Book debts	58	8	7
Ninety-one sheep...	47	15	6
Sundries	26	15	3
	£332	19	4

And that the payment of £155 to the S. A. Bank, stated in the account as having been made on the 6th March, by defendants, had been made by them on the afternoon of that day, solely in consequence of an express and positive

promise then made to them by Redelinghuys, that he would early on Monday, the 8th, give them Searight's, Home & Eagar's, and Hurley's notes, which they might discount, and therefore that this payment ought to be considered (and so the Court were of opinion) to be in the same situation as if it had been made on the 8th.

Consequently, that the defendants were entitled to set off against and deduct from the said sum of £661 10 10 the said sums of £332 19*s.* 4*d.*, and £155 ... 487 19 4

leaving the balance of... ... ... £173 11 6 as the amount really at issue between the parties in this case.

The defendants on their part admitted that the two acceptances for £300, payable on the 24th June, 1847, stated in the same account as having been granted by them on account of Redelinghuys on the 8th March, had actually been granted by them and delivered to his creditor Muller, on the 24th of February, and consequently that the defendants were not entitled to take credit for that sum in reduction of the plaintiffs' claim against them in this case.

After hearing the witnesses called by the plaintiffs, the Court were of opinion that the following facts had been proved:—Previously to the 1st July, 1846, the defendants had been for many years clerks of Redelinghuys in carrying on his business as a butcher. On that day they entered into partnership together as butchers, and an agreement was entered into between them and Redelinghuys, by which he undertook to supply them with sheep and cattle, daily as they wanted them to slaughter and sell, and they agreed to pay him for the same an advance of 6*d.* on the prime cost of each sheep, and 10*s.* on that of each ox. Villiers kept the account of the cattle and sheep with which Redelinghuys supplied them. There was also a general agreement between them that for any advances made by the defendants for Redelinghuys, he should give them good bills, which they might discount to provide funds from which to make such advances, as the defendants had commenced business with little or no capital. A settlement of accounts took place, and a balance was struck between the parties at the end of each month, and the balance carried over to the account of the next month. Before the 1st of January, 1847, the balance on either side had never amounted to more than a very few pounds. But on the 31st January, 1847, Redelinghuys was indebted to defendants in a balance of £112 18*s.*

In February, Redelinghuys became more distressed for money, and the defendants increased their advances, both by giving him their acceptances falling due in May, June and July, and by making payments to and on his account,

a cash and cheques on the bank, to such an extent that, after giving him credit for the value of the cattle and sheep he had supplied them with, for the amount of the book debts and bills due to him, which they had received from his debtors, the balance against him on the morning of Saturday, the 6th March, was £326 11*s.* 7*d.*, and at some period near the end of February must have been about £500. In consequence of the increase of the balance against Redelinghuys, the defendants, after the 1st of March, refused to make further advances merely on the faith of Redelinghuys's general undertaking that he would from time to time give them bills which they might discount, and insisted that such bills should be given to them as nearly as possible simultaneously with each advance which they were required to make; and in particular on the afternoon of Saturday, the 6th, they positively refused to pay on Redelinghuys's account the note in favour of Russouw for £155, and the debt due to Muller of £50, without an express and positive promise from Redelinghuys that early on Monday he would give them Searight's note for £300, Home & Eagar's for £200, and Hurley's two notes for £76.

In the end of February and beginning of March, a number of summonses for provisional sentence had been taken out against Redelinghuys for the sitting of the Court on the 12th March.

The state of his affairs and his knowledge of that state were such that the Court held that from and after the 1st day of March, Redelinghuys must in law be held to have contemplated the sequestration of his estate as insolvent. At the same time, it did not appear that before he began to prepare the schedules to accompany his petition for sequestration, which was subsequently to the 9th March, he knew the real amount of the deficiency of his assets to meet his debts; and that during the month of February, and before the 9th March, he did not know the actual state of the account between him and the defendants, further than that the balance was against him to some amount.

It was also proved that, notwithstanding the state of difficulty in which he knew himself to be, he continued up to the 9th, or, at the very soonest, up to the afternoon of the 8th, to hope that if he got assistance from his friend Mechau, or some forbearance on the part of the creditors who had summoned him, so as to enable him to get over the meeting of the Court on the 12th, without being obliged to surrender, that he would be enabled ultimately to pull himself through his difficulties, and was resolved to endeavour to do so. And on the 6th, he obtained from each of

the defendants policies of £1,000 each, which they had respectively effected on their lives, and these two policies, together with one on his own life, also for £1000, he on that day proposed to Mechau to assign to him, if he, Mechau, would give him paper of Mechau's to the amount of £3000, which he could discount at the banks. Mechau rather objected to the security, but declined giving his final answer till Monday, the 8th. Redelinghuys also swore that, if Mechau had granted this loan, he and the defendants, on the strength of it, were to go into partnership as butchers, and that the defendants had no means of knowing the state of his affairs with respect to any other of his creditors than themselves.

Early on Monday, the 8th, Redelinghuys endorsed and gave to the defendants the seven promissory notes above specified, and the Court were satisfied that at the time the defendants received those notes Redelinghuys was still in possession of the life policies, and that they had no knowledge or information respecting the state of Redelinghuys's affairs greater or other than they had on Saturday, the 6th, when they entrusted him with these policies, in order, on the security thereof, to endeavour to obtain a loan from Mechau, to provide them with a capital with which to carry on a partnership concern with Redelinghuys. Redelinghuys swore that he did not give these seven notes, or any of them, to the defendants for the purpose or with the intention of thereby giving them a preference.

On Monday, the 8th, Mechau refused to grant the loan on policies, but offered, if the creditors who had taken out summonses would withdraw them and receive payment of one half of their debts in cash, and take Redelinghuys's own acceptances for the other half, he would advance the cash required for that purpose. Redelinghuys then went away to see if the attorneys of those creditors of his would agree to this proposal, and either on that day, or, as Redelinghuys positively swore, on the next day, the 9th March (on this point there was some discrepancy between the witnesses), but, at all events, before he returned to Mechau to inform him of the result of his communication with the attorneys, two of his creditors to an amount of about £675 arrived in town, met Mechau, and told him that they were come to take out summonses for the 12th against Redelinghuys, and that they would neither give him time nor accept less than payment in full. On Redelinghuys's return, he told Mechau the attorneys would not accept the proposal, and Mechau told him what the two country creditors had said to him. Redelinghuys replied, that in that case it was better that Mechau should not

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further interfere, and immediately resolved to make no further attempt to struggle through the difficulties, and to surrender his estate immediately, which he did on the 18th March.

The *Attorney-General*, for the plaintiffs, maintained, 1st, that it was proved that on the morning of the 8th March, the defendants were creditors of Redelinghuys; 2nd, that it was admitted that Redelinghuys contemplated insolvency on the 8th; 3rd, that the delivery of the bills, &c., to defendants on the 8th had the effect of preferring them to the extent to which it had the effect of reducing the ultimate balance due to them; 4th, that by his delivery Redelinghuys intended to give them a preference; 5th, that the transaction on the 8th was not from its nature one in the ordinary course of business, and that even if from its nature it would have been so, still that the notorious insolvency of Redelinghuys on the 8th rendered it out of the course of business; 6th, that there was a mutual understanding between them and Redelinghuys, the one to give and the other to receive a preference.

The Court without calling on the defendants' counsel, *Ebden* and *Watermeyer*, held that the plaintiff had failed to establish his fourth, fifth, and sixth propositions. That the delivery of the notes, &c., made to the defendants on the 8th March, was in the ordinary course of the business and dealings which had for some time subsisted between Redelinghuys and defendants, and that there was no evidence to show that the delivery was made and received in consequence of any collusive arrangement, mutual understanding, or common consent between the insolvent and defendants, the one to give and the other to get a preference over his other creditors. And, therefore, gave judgment for defendants, with costs.

Norton's Trustees *vs.* Norden's Trustees.

Partnership. Ordinance No. 6, 1843, § 34.

The claim of one co-partner for over-advances is against his co-partners and their separate estates, and not against the company or its estate.

Dec. 22.

Norton's Trustees vs. Norden's Trustees.

The facts of this case were as follows:—John Norton (now represented by the plaintiffs), J. D. Norden (now represented by the defendants), and L. Norton, in 1838 entered into a co-partnership to carry on business as general

merchants, auctioneers, and agents, in Graham's Town under the firm of J. D. Norden & Co., and at Cape Town under the firm of John Norton & Co. The business of the co-partnership was accordingly carried on, according to the provisions of the deed of co-partnership, at Graham's Town by J. D. Norden and L. Norton, and at Cape Town by the said John Norton, from the 1st January, 1839, until the 1st of June, 1843, when the co-partnership was dissolved.

On the 15th February, 1844, John Norton assigned to the plaintiffs, in trust for his creditors, all his estate, &c., to be by them held and realized for the uses and purposes set forth in the trust deed. In consequence of the allegation of John Norton, that during the continuance of the said partnership he was very largely in advance to it, and that at the time of the dissolution thereof it was largely indebted to him, and of the refusal of the said J. D. Norden and L. Norton to come to any settlement of accounts of and concerning the dealings of the said dissolved co-partnership, the plaintiffs commenced an action against both of them, which was not prosecuted, in consequence of the death of Louis Norton on the 18th of April, and of J. D. Norden on the 24th of April, 1846. After these deaths, their estates were for a time administered by their respective executors dative, with whom the plaintiffs endeavoured without success to come to a settlement of the accounts of the dissolved co-partnership. The plaintiffs, in consequence, employed H. Hewitt, an accountant, to investigate and make up the books of the said co-partnership, who, having done so in so far as the state and condition in which the books and accounts of the Graham's Town firm had been kept and left by the said J. D. Norden and L. Norton would allow, found that the said J. Norton was entitled to demand and receive from his said two late co-partners conjointly, by reason of the transactions of the co-partnership up to the date of its dissolution, the sum of £7725 6s.

On the 4th August, 1847, the estates of J. D. Norden and L. Norton were severally surrendered as insolvent by their respective executors dative; and thereafter the plaintiffs were duly confirmed as trustees of J. D. Norden's estate, and R. W. Eaton and J. King as trustees of L. Norton's estate.

On the 3rd of March, 1848, in consequence of certain intricate questions which had arisen between the trustees of J. D. Norden, the trustees of L. Norton, and the creditors of the said dissolved co-partnership, as to whether certain property formed part of the co-partnership estate or of the private estates of either J. D. Norden or L. Norton, and until the decision of which the just claims of

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the said creditors could not be ascertained, nor the partnership estate wound up, it was deemed necessary that it should be surrendered as insolvent, which was accordingly done; and William Gadney and John Barry were duly confirmed as trustees thereof.

The plaintiffs duly proved a debt upon the insolvent estate of J. D. Norden for the said sum of £7725 6s.; but the defendants, in the liquidation and distribution account thereof framed by them, refused to rank, and did not rank, the plaintiffs for any amount or sum whatever.

The plaintiffs having objected on this ground to the said account as framed by the defendants, were ordered to file a declaration, which they did, and in which they set forth all the facts above narrated, except the surrender as insolvent of, and the appointment of trustees to, the estate of the dissolved co-partnership; and further alleged that by the deed of co-partnership, J. D. Norden and L. Norton were bound and obliged to keep proper books of accounts containing and manifesting the transactions in business carried on by them at Graham's Town under the firm of J. D. Norden & Co.,—that they had neglected and failed to do so, or to cause the same to be done,—and that the accounts connected with the business of the said firm, and especially with the effects thereof in their hands at the dissolution thereof, were kept and left in such a grossly inaccurate and irregular manner, that no books or accounts exist or are capable of being framed whereby it is possible to fix or determine how much of the sum of £7725 6s. aforesaid is due to the plaintiffs by the estate of the said J. D. Norden, and how much by the estate of the said L. Norton; by reason whereof, and of the gross negligence and breach of covenant so committed as aforesaid by the said J. D. Norden and L. Norton, the plaintiffs maintain that the said J. D. Norden and L. Norton rendered themselves jointly and severally liable to the said John Norton for the whole amount due to him by them, or either of them, in regard of the said dissolved co-partnership; and that the plaintiffs are entitled to prove the whole of such amount as a debt upon each of the said several insolvent estates, and to receive dividends thereon to the extent of the said debt.

Wherefore the plaintiffs prayed that the defendants might be condemned to debate the debt proved by the plaintiffs upon the said insolvent estate of J. D. Norden, or otherwise to admit the said debt, and to rank the same as a concurrent debt, and to award a dividend upon the true and just amount thereof, and to amend the said liquidation and distribution account accordingly, and to pay the costs of this suit.

To this declaration the defendants filed exceptions, and as the reasons thereof, maintained,—1st, That before pleading to this action or making any answer to the claim or demand therein made, they are entitled in law to the benefit *de plus petitione in tempore*, and accordingly claim the effect thereof, because the claim of the plaintiffs is a claim against the late partnership or firms of John Norton & Co. and J. D. Norden & Co., consisting of the said late John Norton and the said late J. D. Norden and L. Norton, the estate of which said partnership was, on the 3rd March, 1848, surrendered as insolvent, and is now administered by W. Gadney and J. Barry, as the duly confirmed trustees thereof. 2ndly, Because under the provisions of the Ordinance No. 6, 1843, § 34, the plaintiffs are not entitled in law to prove or demand payment of the said claim out of the private estate of J, D. Norden, as they have done, until after the estate of the said company of J. Norton & Co. and J. D. Norden & Co. shall have proved insufficient to satisfy the same, and that the plaintiffs have not yet proved or claimed in said company's estate. Wherefore the defendants prayed that the plaintiffs, before being allowed to prove or demand payment of their pretended claim on the private estate of J. D. Norden, be ordered and directed, if they shall think fit and advisable, to prosecute their said claim, to prove and claim the same in the estate of the said company of John Norton & Co. and J. D. Norden & Co.; and that the defendants in the present instance, under the benefit of the approved exception, be absolved from the instance with costs.

The defendants also excepted to certain parts of the declaration as containing argumentative and irrelevant matter, and prayed that the same should be expunged with costs; but, without argument thereon, withdrew this exception.

After hearing *Brand* and *Watermeyer* in support of the exception, and the *Attorney-General* and *Ebden contra*, the Court held that the claim of the plaintiffs was a claim against the separate estate of his two late co-partners, and not against the estate of the late co-partnership, against which it was not competent for him to make any claim of the nature of that made by him in this action. And therefore overruled the exception, with costs.

CHAPTER II.

INTERDICT.

NIEKERK *vs.* MINISTER AND CHURCHWARDENS OF THE CHURCH AT D'URBAN.

Dutch Reformed Church Case, Church Regulations, Art. 76. Baptism of child, interdicted.

In this case the Court interdicted the vestry of the Dutch Reformed Church at D'Urban from proceeding with a personal examination of a member of the Church until such vestry should have complied with the 76th Church Regulation, which requires a certain previous notice of accusation and proofs; and also from enregistering the said Church member as the father of an alleged illegitimate child and baptizing it in his name.

1837. Feb. 7. Niekerk vs. Minister and Churchwardens of the Church at D'Urban.

On the 24th of January, 1837, Niekerk made an application to the Judges at Chambers, for an interdict against the respondents, and in support thereof produced the following affidavit:

"Hendrik Albertus van Niekerk, H.'s son, maketh oath and saith: That in or about the month of October, 1834, he, the deponent, was required to attend before the clergyman and vestry of the Dutch Reformed Church of D'Urban in the Cape District, upon a complaint or charge of one Elizabeth Johanna Ras, that he, the deponent, was the father of an illegitimate child, procreated by the said Elizabeth Johanna Ras.

"That this deponent having attended the meeting of the said vestry, denied the charge aforesaid and maintained that the decision of that question belonged to the jurisdiction of the Civil Courts.

"That the said vestry then directed that the deponent was to bring an action against the said Elizabeth Johanna Ras before the competent Civil Court.

"That in the month of December last, deponent was formally summoned on the part of the vestry, to appear before the said vestry on the 28th December last, for the purpose of answering to such questions as should be put to him touching the matter aforesaid.

"That deponent, in answer to said summons, did not attend the meeting of said vestry, but forwarded to the same a letter, requesting to know whether his appearance was required as an accused or as a witness.

"That on or about the 2nd of January last the aforesaid letter of the deponent was returned to him, and a fresh summons served upon him, for his appearance on the 31st of this month of January, for the purpose aforesaid.

"And the deponent further says, that he verily believes that the object of the vestry is to examine him upon the charge aforesaid, and also upon a claim that the deponent be registered as the father of the said illegitimate child; and tha the, the said deponent, has reason to fear the said vestry will enregister him, the deponent, as the father of the said child, or will baptize the said illegitimate child as a child of him the deponent.

"And this deponent finally says that he is a married man since 1812, and a father of twelve children, of whom four are yet alive, and some are married,—and that by the proceedings aforesaid his character, and the peace and comfort of his family is already, and if persisted in, will in a greater degree be, injured and destroyed."

In respect whereof the Judge granted the following interdict:

"Upon reading the affidavits of the said Hendrik Albertus van Niekerk, and having heard Mr. Advocate Brand in support thereof, I hereby interdict the vestry of the Dutch Reformed Church at D'Urban from proceeding with any personal examination of the said Hendrik Albertus van Niekerk, until the said vestry shall have complied with the regulation contained in the 76th Article of the General Regulations of the Dutch Reformed Church in South Africa: And I further interdict the said vestry from enregistering the said Niekerk as the father of the illegitimate child procreated by Elizabeth Susannah Ras,—and from baptizing the said child in the name and as being the child of the said Niekerk. This interdict to have effect until and during the first four days of next term.

"Dated at Chambers, this 24th day of January, 1837.

"W. MENZIES."

On the second day of term the Court enlarged the time and continued the interdict in force until the 7th February, 1837.

This day *Brand*, for the applicant, moved the Court to make the above interdict absolute. He put in the above affidavit of the 24th January, 1837, an extract from the

minutes of the proceedings of Consistory of D'Urban on the 18th November, 1836, which was as follows:—

ve. and ardens urch at ban.

"Art. 6.—The Rev. Præses submitted to the churchwardens: That Jan Ras, father of Elizabeth Johanna Ras had again made application to have the illegitimate child of his daughter (of which, according to his saying, Hendrik Albertus van Niekerk, H.'s son, is the father) christened in the name of him, Van Niekerk.

"That on the 30th October, 1834, when the matter between Elizabeth Johanna Ras and the said H. A. van Niekerk was pending before the churchwardens, he, the said Van Niekerk, had positively and repeatedly promised, without delay, to bring the matter in question before the Supreme Court, and convince the churchwardens, that he is not the father of the child;—on which positive promise he was told that the churchwardens, relying on that promise, would postpone the christening of the child.

"And as more than two years had now elapsed since the said H. A. van Niekerk made that positive promise, without having complied therewith,—whether he, Van Niekerk, should not again be summoned, to be further dealt with (onderhouden) on the subject, in order that the child might be christened.

"As also respecting the declaration made by him on the said occasion, on the 30th October, 1834, which was laid before the churchwardens, as passed in Cape Town on the 25th October, 1832, by Daniel Gerhardus W. Louw, G.'s son, chiefly purporting that the said D. G. Louw is the father of the child. In consequence of which declaration, the said D. G. W. Louw, G.'s son, voluntarily appeared before a church committee on the 6th July, 1835, and applied for a copy of a false declaration, which was submitted to the churchwardens by Hendrik Albertus van Niekerk, in the matter of Elizabeth Ras;—which declaration, &c.

"And further declared to the committee never to have had any connection with Elizabeth Ras, otherwise he would have honoured and married her; and that H. A. van Niekerk had already, before and after that time, made offers of reward to him, Louw, if he would maintain that he is the father of the child of Elizabeth Ras.

"A true extract:

"M. NEETHLING, Sen., Scriba."

And a copy of his letter to the consistory, dated 24th December, 1836, referred to in his said affidavit, in which he acknowledged to have received the summons to appe

1837. Feb. 7.

Niekerk *vs.* Minister and Churchwardens of the Church at D'Urban.

before the consistory on that day to answer such questions as should be put to him according to the above extract, which was annexed to the summons, and added, *inter alia*, as follows:

"I must acknowledge, reverend gentlemen, that I can hardly conceive from the above-mentioned whether I am summoned as a witness against G. W. D. Louw, or as the defendant and accused upon a complaint by Miss Ras.

"If the last case is the fact, I must remind your reverends, that at the meeting of the vestry on the 30th October, 1834, I positively denied the grievance or accusation that I was the father of the child of Miss Ras, which I still deny, in which case the 76th Article of the Synodical Laws directs that notice of the accusation brought against me, together with a recital of the proofs to be adduced, must be given fourteen days previous; and when this is done, I will defend myself in a proper manner.

"I feel myself under the necessity to request from your reverends to acquaint me in what quality I am summoned, whether I am to answer as a *witness* or as an *accused*; declaring that I am ready and willing at all times to appear in a lawful manner before your tribunal."

And the General Regulations for the direction of the Dutch Reformed Church, sections 48, 76.

In respect whereof, and that no appearance was made for the Consistory, although notice to that effect had been duly served on them, the Court ordered that the interdict do remain in force, until cause be shown for its discharge.

This case was not again brought before the Court.

Watson & Chase *vs.* Lawton.

Interdict granted restraining respondent from doing any act in the management of his business or disposal of his property and funds without the consent and approbation of the applicants, as inspecting creditors appointed by resolution of creditors at a meeting summoned by respondent, respondent having subsequently acted contrary to the tenor of such resolution.

1844. June 7. „ 11.

Watson & Chase *vs.* Lawton.

The *Attorney-General*, on behalf of Harrison Watson and I. Chase, applied for a rule *nisi* for an interdict and order to prevent respondent from doing any act in the management of his business or in the disposal of his property and funds without the consent and approbation of the applicants, as inspecting creditors appointed in the resolu-

1844.
June 7.
" 11.

Watson & Chase vs. Lawton.

tions of respondent's creditors, dated January 26, 1844. And put in an affidavit by Harrison Watson, of the firm of Thomson & Watson, who swore that respondent is indebted to the said firm in a sum of £5,758. That at the meeting of his creditors on the 26th January respondent laid a statement of his affairs before them, from which it appeared that his debts and liabilities amounted to £27,510 8*s.* 7*d.*, and that his assets amounted to £37,618 17*s.* 2*d*; and stated that a number of creditors to a large amount were pressing him for payment, and that he was unable to meet their demands, and requested time for the payment of his debts. That the above resolutions were passed, &c. That since the said meeting the respondent hath conducted his business contrary to the provisions contained in the said resolution, and contrary to the repeated directions and remonstrance of this deponent, acting under the authority thereby given, and the said respondent had appropriated large sums of money in payment of debts due by him, by virtue of his endorsement upon promissory notes given by divers persons in favour of the said respondent. That from a statement made up by respondent it appears that between the said 26th of January and 18th May last, he hath paid the sum of £1,027 1*s.* 2*d.* to take up notes, bills, &c., signed or made by him, the whole or greater part of which deponent verily believes he had become liable to previous to the 26th January, which he ought not to have paid according to the provisions of said resolutions; and that the remaining creditors of the said respondent may be seriously injured thereby. That the respondent has stated to this deponent that he will continue to pay certain other creditors in like manner. That according to a statement of his affairs made by respondent on Monday last, it appears that he had overvalued his property greatly, and had under-estimated his liabilities; and that deponent believes, should the respondent continue to carry on his business in manner as he has done, that the estate will be greatly diminished, and that the creditors whose debts will not fall due for some time will not be paid in full by the said Lawton. That an advertisement has been publicly given that the respondent will hold an extensive sale at his store of a general assortment of merchandise. And finally, this deponent saith, that he hath been informed and believes, that on the 6th of June inst., a large quantity of goods were removed from the stores of the respondent to the store of his brother, Nathan Lawton, who is ranked by the said respondent as a creditor to the amount of £852 9*s.* 3*d.*

Ebden, contra, opposed the application on the ground that respondent had not had notice of it, or a copy of the affidavit. And, secondly, that the applicants had not made

out a *prima facie* case sufficient to entitle him to ask even for a rule *nisi*.

Rule *nisi* granted to show cause on Tuesday, and in the mean time respondent interdicted from doing any act in the management of his business or the disposal of his property without the consent and approbation of the inspecting creditors, the applicants.

Postea (Tuesday, 11th June).—*Ebden* showed cause against the rule, and quoted *Chitty's General Practice, vol.* 1, *p.* 2, to show the caution with which such interdicts ought to be granted. And objected to the allegations in the applicant's affidavit respecting the non-compliance of the respondent with the agreement in the resolutions, and the instructions of the two inspecting creditors. He maintained that by the true intent of the agreement, he was entitled to pay in the first instance all debts due by him to creditors not belonging to the class called in the agreement "original creditors." He put in an affidavit, sworn by the respondent, admitting having paid £1,000 in discharge of debts not being "original debts." That these payments were chiefly made with the knowledge and consent of one or other of the inspecting creditors, *bonâ fide*, and generally after legal proceedings. Admitting that he had advertised a sale, but this was with the intention of applying the proceeds in payment of his creditors *pro rata*. That he had always been willing to pay over the proceeds, &c., to his inspectors, provided they would protect him against the claims of his creditors not being original creditors. That in October, 1843, he had sold to his brother, Nathan Lawton, 750 bags of rice, which respondent had bought from Searight & Co., and then bonded in the name of the latter, and 500 bags were delivered. That respondent, in payment of the said rice, received from Nathan Lawton three bills for £602 16*s.* 9*d.* in all, which notes were paid on or before the 14th March last, when the last became due. That Searight & Co., after the 26th January, refused to deliver the remaining 250 bags, insisting on holding them in security of their claims against respondent. That Clerke Adams assisted Nathan Lawton with funds to pay the notes for £602 19*s.* 9*d.*, and afterwards, both by himself and his attorney, Reid, demanded delivery from respondent of the said 250 bags, or their value in cash; neither of which respondent informed them it was possible for him to do, That Adams proposed to respondent to resell him the said undelivered rice in barter for good coffee and sweet oil, at the then marketable value, which the respondent acceded to, and accordingly delivered the goods which are the subject

1844. June 7 " 11. Watson & Chase vs. Lawton.

matter of complaint, and referred to in the affidavit of Harrison Watson.

This was confirmed by affidavits from Clerke Adams, E. H. Hunt, Mr. Lawton's bookkeeper, and Nathan Lawton.

Ebden maintained that this transaction, as explained in the above affidavits, was both lawful, consistent with the agreement, and beneficial to the estate.

The *Attorney-General* argued *contra*, and quoted *Van der Linden, p.* 440, and *Story on Equity, vol.* 2, *p.* 204.

The Court were unanimously of opinion that the rule must be made absolute, and the interdict confirmed; with the addition that the applicants be ordered to pay to the respondent, in the mean time, such sums of money as might be adequate for the proper support of himself and family, and in defraying the costs of the legal proceedings pending between him and his creditors. And that the interdict should continue in force until the final decree of the Court should be given in the actions now pending at the instance of his creditors, or any other which might be commenced by them within fourteen days of this date.

DICKSON & CO. *vs.* SUNLEY.

Interdict. Cession.

Interdict granted, restraining the cession or assignment of a certain debt due by L. to the respondent, who was in insolvent circumstances. The Court further ordered the amount of the debt to be attached in the hands of the said L., to answer an action instituted by applicants, creditors of respondent, against respondent.

1846. June 29. Dickson & Co. vs. Sunley.

In this case, the Court, on the motion of the *Attorney-General*, for the applicants, granted, as a matter of course, an order interdicting and restraining W. Sunley from ceding or assigning a certain debt due by C. H. Leibbrandt to the said Sunley, amounting to the sum of £1,500, and that the same be attached in the hands of the said Leibbrandt, to answer a certain action instituted on the 27th instant, by the applicants, against the said Sunley, for the sum of £8,411 15*s.* 6*d.*, with liberty to the said Sunley, or any of his creditors, on giving reasonable notice, to move to have the order rescinded—in respect of the following affidavit, sworn by C. Arkcoll, one of the applicants, of the verity of the said debt, as due to the applicants by the said Sunley; and stating:—

1846. June 29.

Dickson & Co. vs. Sunley.

"That the said William Sunley hath stated his inability to pay the same, and that several writs of execution, proceeding on provisional sentences obtained in this Honourable Court, have been issued against the estate of the said William Sunley; that the deponent verily believes the said estate to be utterly insolvent, and that the object which the said William Sunley has in view in not surrendering the same as such, is to defeat the right of preference which the deponent's said firm possesses in virtue of certain bonds made and passed by him in their favour, and to cede and assign over goods and effects, or money documents, to his other creditors, to the detriment and loss of the deponent's said firm.

"And the deponent further saith that a meeting of creditors of the said William Sunley was held on Saturday, the 27th instant, of which the deponent had no special notice, but finding out the hour at which it was to be held, the deponent attended in behalf of said firm.

"That it was there stated by one of the creditors to be the duty of the said William Sunley to protect certain of his other creditors against the preference of the deponent's said firm. That the said William Sunley, about the beginning of this month, admitted to the deponent that he had assigned over all his boats to one Henry Dederick Jencken, his clerk, at Simon's Bay, to account of a prior debt due by him to the said Henry Dederick Jencken.

"That a large sum of money, to wit, about £4,500, is due to the said William Sunley by one Coenraad Hendrik Leibbrandt, of Hottentot's Holland, and the deponent is led to believe, from the circumstances aforesaid, that the said William Sunley will cede or assign the same, or part thereof, to some of his other creditors, to the prejudice of the claim of the deponent's said firm, unless the same shall be placed under attachment by this Honourable Court."

Executors of Haupt *vs.* De Villiers.

Spolie, mandament of.

Spoliatus ante omnia restituendus est.

1848. Feb. 1.

Executors of Haupt vs. De Villiers.

On the 31st December, 1847, the applicants appeared at Chambers before Menzies, J., and produced an affidavit, stating that they had been duly appointed executors of the deceased Haupt, under letters of administration granted by the Master, and had, as such, entered on the administration

1848. Feb 1.

Executors of Haupt vs. De Villiers.

of the estate of deceased, that amongst his movables there was found on his farm a horse-wagon of the value of about £75; that on the 22nd instant, the applicants had sent this wagon to the Paarl to convey to the farm the persons who were to appraise the estate, and that on its arrival at the Paarl it was forcibly and unlawfully taken possession of by P. J. de Villiers, the respondent, who refuses to deliver up the possession of the said wagon to the applicants, alleging that it was formerly his property, and that he had sold and delivered it to the deceased about the beginning of October last, at a credit of three months, for £79 10*s.*, for which the deceased was to have granted his promissory note, which he had never done, and that, therefore, he was entitled to retake and keep possession of the said wagon; that the respondent has produced no proof to the applicant of these allegations; that although the applicants have published the necessary advertisements calling on all parties having claims against the deceased, to lodge their claims, the respondent has lodged no claim against the estate for the wagon or its price; and that the estate will suffer damage by the unlawful detention of the wagon by the respondent.

In respect of these facts, the applicants prayed for a *rule nisi* and an interdict, in the terms in which they were granted by the Judge.

Whereupon, and after considering the authorities of *Voet* 43, 1, § 7, and 43, 17, § 6 and 7; *Censura Forensis* 1, 2, § 49, 50; and *Van der Linden Inst., p.* 418 *and* 449, the Judge made the following order.

"On reading the above affidavit, it is ordered that a rule *nisi* be granted, calling on the said P. J. de Villiers to show cause, on the 12th January, 1848, or as soon after as counsel can be heard, why he should not be condemned *ante omnia*, to restore possession of the within-mentioned wagon to the applicants, in their capacity as executors of the deceased J. J. Haupt, and to pay the costs of this application;—and also, that an interdict be issued, restraining the said P. J. de Villiers from selling, or otherwise disposing of the wagon, until the said rule be disposed of by the Court.

This day, 1st February, 1848, the *Attorney-General* appeared for the applicants, and *Brand* for the respondent.

The respondent put in an affidavit, in which he admitted the sale and delivery of the wagon to the deceased, but stated that it was delivered only on condition that Haupt should *immediately* grant him a promissory note for the price, payable at three months from the date of delivery, and to the satisfaction of certain parties therein named;—that the deceased had not granted this note before his decease;

and that the respondent had therefore by force re-taken possession of his wagon in the manner stated in the affidavit of the applicants.

1843. Feb. 1.

Executors of Haupt *vs.* De Villiers.

Brand, for the respondent, contended that under the circumstances under which the wagon was delivered, delivery had not the effect of transferring the right of property of the wagon to the deceased, and that it was still vested in the respondent. But he admitted that whatever right or claim the respondent might ultimately be found to have to the wagon, yet, as he had admitted that he had taken possession of it by force from the applicants, in whose lawful possession it then was, the principle of *Spoliatus ante omnia est restituendus* applied, and that he could not effectually oppose the rule for the restoration of the possession of the wagon to the applicants being made absolute.

Rule absolute, with costs.

WILLET *vs.* BLAKE.

Interdict competent to restrain from breach of contract.

Contract between W. and B., that B. should not carry on, during A.'s lifetime, any business whatever at a particular place, not invalid as an improper restraint on natural liberty.

Damages, action of, for breach of such contract.

Aug. 22.

Willet *vs.* Blake.

On the 4th November, 1847, the plaintiff and defendant entered into a certain notarial deed, whereby they dissolved a certain co-partnership before then existing between them, and whereby the defendant also covenanted and agreed with the plaintiff, that in consideration of the sum of £100 paid by the plaintiff to him, he, the defendant, should not, nor would, at any time during the lifetime of the plaintiff, commence, conduct, or carry on the boating business, or any other business whatever, in Simon's Town. Thereafter, in April 1848, the plaintiff made an application to a Judge at Chambers for an interdict to restrain the defendant from carrying on the boating business in Simon's Bay.

In respect of affidavits produced by the plaintiff, that the defendant had, on or about the 17th April, 1848, and subsequently, been carrying on the boating business in Simon's Town, in contravention of his said covenant with the plaintiff, the interdict was *ex parte* granted as prayed;

1848. Aug. 22. — Willet vs. Blake.

to continue until the same should be removed, on cause shown to the Court or a Judge thereof at Chambers.

This interdict was duly served on the defendant, who, having declared his determination to disobey it, and having continued to carry on the boating business, the plaintiff obtained an order, which was served on the defendant, to show cause to the Supreme Court why an attachment should not be issued against him for such his disobedience.

Under this order the defendant appeared personally and by counsel before the Supreme Court, and contended that the interdict should be removed, on the grounds that a contract of the nature of the covenant entered into by him was illegal, and therefore invalid, as being an improper restraint on his natural liberty; and 2ndly, that, even although the covenant should be considered to be legal and valid, a breach of it did not entitle the plaintiff to obtain an interdict to restrain the defendant from in future contravening it; and that the only legal remedy which was competent to the plaintiff was an action of damages for each breach of it by the defendant, *after* such breach had been committed.

The Court held both these propositions to be untenable in law; and that the plaintiff was entitled to the interdict; and declared that if the defendant in future disobeyed the interdict which had been issued, it would be enforced by an attachment of his person.

Thereafter the plaintiff brought an action against the defendant, setting forth the contract, the breach of it by the defendant, and praying that defendant should be condemned to pay the plaintiff £50, as and for the damages which had been occasioned to him by the defendant's breach of contract; and secondly, that the defendant should be restrained by a perpetual interdict from further contravening the said contract.

No appearance was made for the defendant. The plaintiff having proved the allegation in his declaration, the Court gave judgment for the plaintiff. Damages, £1, with costs, and made the interdict perpetual, as prayed.

CHAPTER III.

PLEADING.

NISBET & DICKSON *vs.* VENABLES.

Exceptio non-qualificatæ pleaded to title of assignees. 1828. June 23.

[Vol. I, p. 304.]

MURRAY *vs.* DE VILLIERS.

Actio redhibitoria pleadable to whole sale if part of goods are of bad quality; and can be pleaded in answer to an action for the purchase money. 1829. March 17.

[Vol. I, p. 366.]

RUSSOUW *vs.* STUART.

Exceptio rei judicatæ or litis finitæ no answer to a civil action of assault because of a previous criminal prosecution. June 23.

[Vol. I, p. 378.]

HORN *vs.* LOEDOLFF ET UXOR.

Under general plea of nihil debet, special defences cannot be set up. 1830. Jan. 12.

[Vol. I, p. 403.]

MACKAY *vs.* PHILIP.

1830. July 5. „ 16. *Exceptio declinatoria fori to an action for the publication of a libel must be founded on some fact alleged in the declaration or admitted by plaintiff. Therefore, where the declaration merely averred the libel and its publication, the defendant cannot competently except that this took place out of the jurisdiction, that being denied in the plaintiff's replication.*

It is no ground of exception to an action for libel that the libellous work was published in England. Copies having been circulated in the Colony, the Court held the writer on his return to the Colony, where he had his domicile, answerable in such action.

[Vol. I, p. 455.]

HORSTOCK *vs.* BONIFACE AND OTHERS.

Sep 7. *Exception of uncertainty and inartificiality of plea sustained.*

[Vol. I, p. 467.]

LOUISA AND ANOTHER *vs.* VAN DER BERG.

Sept. 10. Oct. 11. *Plea of turpis causa sustained.*

[Vol. I, p. 471.]

NISBET & DICKSON *vs.* COOKE.

Sept. 29. *Exception of non-qualification overruled on the provision not pleadable again in the principal case.*

[Vol. I, p. 482.]

NIEKERK *vs.* LETTERSTEDT.

1831. Sept. 2. *A plaintiff having, as sole administering guardian and executor, claimed in his declaration against the defendant in*

solidum, cannot on the same declaration, claim pro parte when the proof shows plaintiff to have been a joint administering guardian and executor. 1831. Sept. 2.

[Vol. I, p. 531.]

PFAFF *vs.* SCHENK.

Rule of Court, 20.

ice of filing of declaration may be given in the Gazette when defendant cannot be found. Dec. 15.

[Vol. I, p. 536.]

MEYER *vs.* CARLISLE AND OTHERS.

iance between summons and declaration as to number of parties summoned and declared against, no ground for exception. 1832. March 6. " 20.

[Vol. I, p. 540.]

LIESCHING *vs.* CUYLER.

here exception is taken against the mere form of pleading, no replication or subsequent pleading allowed. March 6.

[Vol. I, p. 542.]

BANCE *vs.* BUCKLEY.

Verbal Injury. Pleading.

ception to plea, for obscurity and uncertainty, in a case of verbal injury, allowed.

June 26.

Bance vs. Buckley.

This was an action brought by the plaintiff for damages tained by him by reason of the verbal slander of the endant.

The declaration set forth that the plaintiff was, at the ie of the committing of the grievances hereinafter men-

1852. June 26. — Bance vs. Buckley.

tioned, and still is, a lieutenant in the Royal Navy, and Port Captain of Table Bay, and was at the time, and still is, in the business or employment of furnishing vessels in distress in the said bay with cables and anchors; and that the defendant, knowing the premises, but contriving falsely to injure the said plaintiff in his credit and reputation, and also in his said employment, did, on the three several occasions set forth in the declaration, falsely and maliciously publish of and concerning the said plaintiff, the false, scandalous, and defamatory words following, to wit, "Captain Bance has sent on board the French ship *Mascarenhas* a chain cable, which he (meaning the said plaintiff) knows to be insufficient, and which has already lost two or three ships." "I will make Captain Bance ashamed before the Court for his having sent off a chain cable to the French ship *Mascarenhas*, which has already lost two or three ships." "You (meaning the plaintiff) sent a cable off to the French ship (meaning the ship *Mascarenhas*), which you knew was good for nothing, and the consequence was, you were obliged to send off another anchor and cable to-day."

The defendant pleaded, first, the general issue. Secondly, the defendant admitted that the said plaintiff is a lieutenant in the Royal Navy, and Port Captain of Table Bay, and also that the said plaintiff exercised the business or employment of furnishing vessels in distress in Table Bay with cables and anchors; but denied that the exercise of the business or employment mentioned, and which gave rise to the words or expressions at issue, was any part of the plaintiff's lawful business or employment, in so far as any emoluments or profit is concerned, and tenders issue with the plaintiff thereupon accordingly. Thirdly, the defendant admitting the inducement of said declaration and claim above recited, and that certain words were made use of by him in reference to said chain cable, denied that such words as shall be proved to have been so used by him support this action, because he saith that the words so used by him are true, and that he did not falsely and maliciously use them, which the said defendant is ready to verify, and tender issues thereon, &c.

The plaintiff filed the following replication and exceptions:—

And the said plaintiff for replication to the plea of the said defendant by him first above pleaded, and whereon he hath tendered issue to the said plaintiff, saith he joins issue thereon.

And as to the plea of the said defendant, by him secondly above pleaded, and whereon the defendant hath tendered issue, the said plaintiff excepts thereto, inasmuch as the same is obscure and uncertain, and so far as the said plaintiff can understand the same, tenders an issue on matter

which is irrelevant and immaterial in this suit; wherefore the said plaintiff prays that the same may be amended, or expunged, with costs.

1832. June 26. — Bance vs. Buckley.

And as to the plea of the said defendant by him thirdly above pleaded, and whereon he hath tendered issue, the said plaintiff excepts thereto, inasmuch as the same is obscure and uncertain, and the said plaintiff cannot thereby know what words the said defendant thereby means to justify. Whereupon the said plaintiff prays that the same may be amended, or expunged with costs.

After hearing the *Attorney-General* for plaintiff, and *Cloete* for the defendant, the Court sustained the exception, with costs.

Lombard Bank *vs.* Hammes, Husband of Storm.

A good defence not set forth in plea, cannot be maintained; parties bound by the pleadings in the case.

Dec. 20. — Lombard Bank vs. Hammes, Husband of Storm.

The plaintiff, as holder of two bonds granted in his favour by the defendant's wife and her six sisters (executed for them by their father, in virtue of a general power of attorney granted to him by them), whereby they were bound *singuli in solidum* under renunciation of the benefit *de duobus vel pluribus reis debendi*, and which specially mortgaged a house registered as the property of defendant's wife and her said sisters, had brought an action for payment of the bonds against one of the said sisters of defendant's wife *in solidum*, and obtained a judgment, by which the said house was declared executable, in virtue of which the house was thereafter sold under the process of the Court by the Master. After the proceeds had been paid to plaintiff, there was still a balance of £305 due to him on his said bonds, for which he now sued defendant and his wife *in solidum*.

The defendants, in their plea, merely denied that the house had been purchased by her and her sisters, and that her father had had any authority to purchase it for them, or to execute the bonds, or to renounce the *beneficium de duobus* &c., even if he had been authorized to execute the bonds.

The Court, after hearing parties, held these defences to be bad.

The *Attorney-General* then objected to the claim of the plaintiff, in respect that the judgment, by which the house had been declared executable, and in execution of which it had been sold, had been given in an action to which he had not been a party, and that as the plaintiff's claim was only

1832. Dec. 20.

Lombard Bank vs. Hammes, Husband of Storm.

for the deficiency arising out of, and in consequence of, that irregular sale, the claim could not in its present shape be maintained against him.

But the Court held that this defence, not having been set forth in the plea, could not now be maintained, and, in respect of the pleading of the parties as stated on the record, gave judgment for plaintiff, with costs.

SPARKS *vs.* HART.

Verbal injury. Justification. Veritas convicii. Pleading exception.

Veritas convicii cannot be pleaded in justification of words charging plaintiff with indecency and immodesty.

1833. Feb. 5.

Per WYLDE, C.J.—*A plea of justification to a declaration containing only one count must justify the whole of such count, and not deny one part and avoid another part thereof.*

Per MENZIES, J.—*Such justification can be competently pleaded to part only. Veritas convicii can only be pleaded in justification where there is an absence of an animus injuriandi, which absence the law will presume is the accusation of a criminal act, or for the ends of public justice. Indecency and immodesty are not such acts.*

Per KEKEWICH, J.—*Semble. Agreed with* WYLDE, C.J.

[Vol. III, Part 1, p. 3.]

ASPELING, EXECUTOR OF LOW, *vs.* J. C. WALDPOT AND J. L. WALDPOT.

Where a person had obtained leave of the Court to intervene as co-defendant, and the plaintiff in his declaration did not join him as such co-defendant, declaration amended, with costs.

Exceptio non-qualificatæ must be specially pleaded.

Summons: variance, what is not.

Feb. 12. June 6.

Aspeling, Executor of Low, *vs.* J. C. Waldpot & J. L. Waldpot.

The summons in this case commanded the Sheriff to attach in the hands of J. G. Steytler, of Cape Town, £30, being an amount due and owing by the said Steytler to J. C. Waldpot, of the district of Stellenbosch, to answer to

D. J. Aspeling, of Cape Town, in a certain action in this Court, wherein *the said D. J. Aspeling, in his* capacity as agent to J. G. Low, recovered provisionally against the said J. C. Waldpot, by virtue of a sentence dated 31st March, 1832, the sum of £90, &c., &c.

On the 11th December, Steytler appeared and confessed the claim as prayed against him, and decree was accordingly given against him as prayed.

On the 20th December, 1832, J. L. Waldpot obtained by consent an order of a Judge at Chambers, admitting him to intervene and join as a defendant in an action.

On the 22nd December, 1832, plaintiff filed his declaration, which was headed: "Between D. J. Aspeling, as testamentary executor of the late J. G. Low, plaintiff, and J. C. Waldpot, defendant;" and set forth that "the defendant, John C. Waldpot, has been summoned to answer the plaintiff, D. J. Aspeling, as testamentary executor of the late J. G. Low, in an action brought by the said plaintiff against the said J. G. Steytler, together with the said defendant, why the said J. G. Steytler should not be decreed to pay over to the said plaintiff a sum of £30, which he owes to the said defendant in this suit, J. C. Waldpot." And made no mention whatever of J. L. Waldpot, who had been permitted to intervene and join as defendant in the action, on the ground that he had an interest in the said debt of £30.

The defendants, J. C. Waldpot and J. L. Waldpot, excepted to the declaration that it was irregular in form, in as far as the defendant, J. L. Waldpot, who is still living, is not made a co-defendant therein, notwithstanding the order made by the Judge in Chambers, &c., &c., and moreover materially varies from the summons in this case, wherein the said plaintiff neither calls and styles himself as acting in his capacity as agent to J. G. Low, nor as acting in his own personal name, whilst in the declaration he describes and styles himself the testamentary executor of the late J. G. Low.

Brand, for the defendants, was heard in support of the exceptions, and in support of the first quoted *Merula* 447, *ch.* 1; *Voet*, 5, 1, §§ 34, 36.

As to the second exception, the Court held that in the summons the plaintiff only inserted his own name as party, without describing in what character he sued, that part of the summons in which alone he was described as general agent of law being merely a narrative of what he had done in that capacity at a former time, when Low was alive.

The Court were of opinion that if the summons had described the plaintiff as agent, he could not declare in his

1833. Feb. 12. June 6. Aspeling, Executor of Low, vs. J. C. Waldpot & J. L. Waldpot.

capacity as executor without having obtained leave to amend the summons, if he had been by error therein described as general agent. And that, if the death of Low had changed his capacity from general agent to that of executor, he could not declare, without first obtaining leave to appear as party in his new capacity. But that, although the summons was in this case defective, in so far as it did not state the capacity in which Aspeling sued, and might have been met by a plea of *non-qualification*, yet as such a plea was not taken in due time, and as the declaration, although it fully and distinctly described the character in which plaintiff sued, did not contradict the summons, that this exception was bad.

The Court, therefore, overruled the second exception.

The Court held that after the Judge's order, J. L. Waldpot was a party in the case, and that his name should, in the heading of the declaration, have been mentioned as a defendant, and also in the body of the declaration, by inserting between the words "defendant" and "why" the words "in which J. L. Waldpot has by order of a Judge at Chambers been joined as a party;" and ordered the declaration to be amended in these respects, with the expenses of the motion at Chambers as costs to the defendants.

Thereafter the defendants filed the plea, in which they denied all and every allegation in the declaration, and put the plaintiff to the proof thereof.

Postea (6th June, 1833).—At the trial, the plaintiff completely proved all the facts of his case, except that he did not bring any evidence to prove his qualification of executor of Low.

After plaintiff had closed his evidence, *Brand* for the defendants objected that as the declaration alleged that plaintiff was executor of Low, and as he had not proved that he was so, he was now entitled to move for absolution from the instance.

The Court held that the defendant, not having taken the exception of non-qualification before pleading and joining issue, was not entitled to object to the plaintiff's qualification now, but must be held to have admitted the plaintiff's title to sue as executor, and consequently that it was not necessary for plaintiff to lead evidence to prove his qualification, and gave judgment for plaintiff with costs.

Du Prez *vs.* Rose.

Exception Rei judicatæ vel litis finitæ is a plea on the merits, and not a preliminary exception.

1833. Feb. 27. Du Prez vs. Rose

The Court in this case held that a plea of *rei judicatæ et litis finitæ*, although in the language of the civil law called the *exceptio rei judicatæ et litis finitæ*, was not an *exception* in the sense in which that word is used in the forms of procedure in this Court, but a plea on the merits; and before giving judgment on the relevancy of this plea, allowed the defendant to call his evidence on the merits.

Strahan & Levy *vs.* Meyer & Anderson.

Arbitration, Pleading.

1833. Aug. 6. Strahan & Co. vs. Meyer and Anderson.

The cause of action in this case was stated in the declaration to be a certain deed of submission entered into between the parties, and an alleged award thereon given by the umpire; respecting which submission the declaration stated: "And the plaintiff further saith that when the said reference was agreed upon, it was distinctly understood by the attorneys for the said parties respectively, that the only matter in difference between them was the alleged overcharge in the account sales."

In their plea, the defendants excepted to the above-quoted part of the declaration, "because the same is immaterial, inasmuch as the same is not expressed in the said submission to arbitration. Nevertheless the defendants deny that the attorney on their behalf did understand that the only matter in difference between them was the alleged overcharge in the said account sales, and thereupon the said defendants tender issue to the said plaintiffs."

The plaintiffs excepted to the above exception stated in the plea, as being "informal and inartificial, inasmuch as the same alleges that 'the said averment in the declaration is immaterial,'" &c. "Whereas the said averment is not only essential and material on the trial of this cause, but constitutes, moreover, an allegation upon which the said defendants have tendered issue."

After hearing the counsel for the parties, the Court held the exception to the declaration to be good. Whereupon the plaintiffs consented to the defendants being absolved from the instance, with costs.

In Re Richardson *vs.* Nisbet & Dickson, and the Sheriff.

Attorney. Costs. Compensation, plea of.

1833. Aug. 27.

In Re Richardson *vs.* Nisbet and Dickson, and the Sheriff.

In the course of a motion in this cause, the Court unanimously decided that Nisbet & Dickson, who had recovered a judgment against Richardson for £3,000 and costs, and who had been found liable in the costs of a rule which was made absolute at the instance of Richardson, could not plead compensation in respect of the judgment in their favour against the costs of the rule, in so far as regarded the claim of Richardson's attorney in the proceedings respecting the rule. (*Vide Lingenfelder vs. Hoets, 13th December*, 1831.)

Robertson and Osmond, Executors of Naude, *vs.* Executrix of Ziervogel.

Executors. Exceptio non-qualificatæ. Will. Codicil. Proof of capacity of executors. Reconventional claim. Evidence. Entries in books of deceased persons. Compulsory sequestration.

The exception of non-qualification is a preliminary exception to be disposed of before answering over on the merits.

Plaintiffs had been appointed executors by a codicil. At the trial they could not produce the will or codicil, but produced a second codicil, which recited the will and first codicil, and the appointment in the latter, and then proceeded to make further appointments. Held, *that the production of the second codicil was sufficient proof of title, and accordingly overruled the exception of non-qualification.*

N. the testator, had appointed O. & R. his executors, and [illegible]istrators of his affairs in the Colony, and the said [illegible] executors for the arrangement of a

payment of which sum Z.'s executrix also now prayed in reconvention. To the first plea plaintiffs excepted that it was informal for a defendant sued by two plaintiffs to plead a claim in reconvention against one only; to the second they pleaded a denial; and as to the third, admitted the account, and offered to allow it in accounting. HELD, *that the exception was bad, and the plea also, inasmuch as O. & R. sued as executors of the private estate, while the capacity of O. & Z. was as executors of the partnership estate. That executors of private and partnership estates, although the same individuals, must be in law considered as distinct personæ, and that it was therefore incompetent to plead against O., as private estate executor, a reconventional claim against him as partnership executor.*

Where a public book is kept merely for entries of the dates of the payments of a department, an entry in such book is not admissible to show to whom such payments were made.

N. had an estate and executors in this Colony, and another estate and executors in England. Z. obtained judgment in the Colony against N., and thereafter prayed a compulsory sequestration of N.'s estate, which the Court granted, although it was opposed for N. that he had the English estate and executors.

1833. Dec. 3. 1834. June 10. „ 28. „ 30.

Robertson and Osmond, Executors of Naude, vs. Executrix of Ziervogel.

The defendant in this case was sued by the plaintiffs, in their capacity of executors of Naude, in her capacity of sole executrix and administratrix of the estate of her deceased husband, A. B. Ziervogel.

The plaintiffs' declaration set forth that Wm. Naude did, on the 12th July, 1812, make and duly execute a codicil to his will, whereof he appointed the plaintiffs, W. Robertson and Osmond, *executors and administrators of his affairs in this Colony*, and did, on the 15th June, 1813, execute another codicil to his said will, whereby he appointed the said Osmond, together with the said A. B. Ziervogel, his executors for the arrangement of the partnership concerns then subsisting between him, the testator, and the said W. Robertson.

That on the death of the said Naude, the said Ziervogel, together with the plaintiffs, entered upon the administration of his estate.

That Ziervogel then took upon himself the administration of the private estate of the said Naude, and received all sums of money belonging thereto, subject to his paying over or accounting for the same to the plaintiffs.

1833. Dec. 3. 1834. June 10. „ 28. „ 30.

Robertson and Osmond, Executors of Naude, vs. Executrix of Ziervogel.

That Naude had sold a place called Wynberg Estate, which belonged to him, to Proctor and Reynolds for 135.000*f.*, of which he had received from them in his lifetime 7,500*f.*, and that the remaining sum of 127,500*f.* was paid or satisfied by or on the part of the said purchaser to the said Ziervogel, who only paid or accounted to the plaintiff W. Robertson for the sum of 76,264*f.*, leaving a balance due to the said plaintiffs on that account of 51,236*f.*, with interest.

That the said Ziervogel also caused to be sold by public auction, on the 2nd April, 1814, a certain place called Belle Vliet, which belonged to the said Naude, for the net price of 16,220rds. 7sk. 2st., of which sum he had only paid or accounted to the said plaintiffs the sum of 11,110rds. 5sk. 2st., leaving a balance due to the said plaintiffs on that account of 5,112rds. 2sk. with interest.

The declaration then set forth, in precisely the same terms as in the preceding allegation, that Ziervogel had caused to be sold by auction certain movable property of Naude, and certain immovable property belonging in joint property to Naude and the plaintiff Robertson, who had formerly traded under the firm of Naude & Robertson, respectively for the sums of 494rds. 2sk. and 8,435rds., of which the said Ziervogel had only paid or accounted to the said plaintiffs for the sum of 5,555rds. 4sk. 4st., leaving a balance due to said plaintiffs of 3,063rds. 2sk., with interest; which said balances, amounting in all to 25,254rds. 1sk. 2st., the plaintiffs prayed that the defendant might be condemned to pay to them.

The defendant filed an exception to this declaration, in which she excepted: first, to the quality and title of the plaintiffs, in so far as they are not qualified in manner and form as in the said declaration set forth; secondly, the defendant excepted to the nature of the action commenced by the said plaintiffs, in so far as the premises stated by the plaintiffs in their declaration, upon which the present action appears to be founded, that the defendant is not subject to an action of debt, but to an action for rendering an account; thirdly, the defendant excepted that the declaration is inartificially drawn and uncertainly declared, in as far as the said Ziervogel is not alleged therein to have received the purchase amount of the sale of Belle Vliet and the other property aforesaid alleged to have been caused by him to be sold by auction, nor is it alleged in the declaration that the same was paid or satisfied to the said Ziervogel, by or on the part of the purchasers; and also in so far as the plaintiffs do not in their declaration allege when or how the payment of the sum of 127,500*f.* for the purchase of the Wynberg

Estate is pretended to have been made to the said Ziervogel, whether in cash or bonds, so that the said defendant does not know what facts the plaintiffs mean to put in issue or, to what the defendant is to plead.

1833. Dec. 3. 1834. June 10. „ 28. „ 30.

Robertson and Osmond, Executors of Naude, vs. Executrix of Ziervogel

This day, *Brand* for the defendant, in support of the first exception, maintained that the plaintiffs could not produce any legal proof of their appointment as executors of Naude.

WYLDE, C.J., doubted whether this exception ought now to be tried and decided *per se*, or whether the title of the plaintiffs as well as the merits of their claim should not be tried at the same time, after the parties had finally joined issue.

But the other two judges held that the defendant was entitled to have the exception to the title of the plaintiff tried and decided before being obliged to answer over. (*Vide Orphan Chamber vs. Hamman, Executor of Buyskes, 5th December*, 1833; *Van der Linden's Inst., p.* 415).

Thereupon the *Attorney-General*, admitting that he could not produce the will and the codicil executed on the 17th July, 1812, which had been lost or transmitted to England, put in, as proof of the plaintiffs' appointment as executors, the codicil dated 15th June, 1813, referred to in the declaration, which, after stating that the testator Naude appeared before the notary, ran as follows:

"And this appearer did declare that he hath made and executed his last will and testament in writing, and thereby appointed William Robertson, &c., and John Osmond, &c., executors and administrators of his affairs in this Colony, a copy or counterpart whereof he hath forwarded to England; and he, the testator, reposing the utmost trust and confidence in his said executors, hath and doth hereby shut out and totally exclude from all interference, all official persons, &c.

"And the testator did further," &c.

The Court held this to be sufficient proof to the plaintiffs' title, and overruled the exception of non-qualification.

After a full discussion of the principles of pleading, the Court overruled the second and third exceptions, with costs, and ordered the defendant to answer over in eight days.

Thereafter (10th June, 1834), the defendant filed a plea, in which she admitted the appointment of the plaintiffs as executors of the private estate of Naude, in this Colony, and that of Osmond and her deceased husband, Ziervogel, as executors for the arrangement of the partnership concerns between Naude and Robertson, and also that on the death of Naude, her husband, Ziervogel, assisted the plaintiffs as the co-executors of the private affairs of Naude, and as such

1833. Dec. 3. 1834. June 10. „ 28. „ 30.

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assumed the title of co-executor of said estate, and that she is executrix of her deceased husband, but denied all the other allegations in the declaration.

And for claim in reconvention alleged, first, that the plaintiff Osmond is liable as co-executor with the said Ziervogel of the partnership concern aforesaid to account to defendant, as executrix of Ziervogel, for the moneys and effects of the said partnership concern, which he has not done, and prayed that he should be condemned to render an account thereof; secondly, that the said plaintiffs, or any one of them, are also liable to account with the said defendant, as executrix of Ziervogel, for the moneys and effects of the private affairs of Naude, and prayed that they should be condemned to render an account thereof; thirdly, that on an account-current, which subsisted between Naude and Ziervogel, there was a balance of £99 19s. 6d. due by Naude to Ziervogel, and prayed that the plaintiffs should be adjudged to pay the same to her.

In answer to the first claim in reconvention against Osmond, as executor of the partnership concern, the plaintiffs excepted thereto, inasmuch as it is informal and irregular for the defendant to make claim in reconvention against one only of two plaintiffs, which the defendant has thereby done.

And in answer to the second, the plaintiffs denied that they or either of them are liable to account to the defendant for the moneys and effects of the private estate of Naude.

And as to the third, they admitted that the said balance of £99 19s. 6d. was due to Ziervogel on the said account-current, and offered to allow it in account.

The *Attorney-General* argued in support of his exception to the first claim in reconvention against Osmond.

Brand, contra, quoted *Voet* 5, 1, 78.

But the Court were of opinion that the authority quoted from *Voet* did not touch the question really at issue between the parties, although it was a sufficient answer to the exception as taken by the *Attorney-General*, and that as Robertson and Osmond sued in one and the same capacity only, viz., as executors of the private estate of Naude, it was not competent for the defendant to set up a plea in reconvention against Osmond in his capacity as one of the executors of the partnership estate of Naude, which was a capacity perfectly distinct and different from the capacity in which he was a joint plaintiff with Robertson.

That Robertson and Osmond, in the capacity in which they sued, must in law be considered as one person, and Osmond in the capacity in which the defendant attempted to sue him in reconvention, as another person, consequently that it

was not competent for the defendant in this action to sue Osmond in reconvention.

The Court overruled the exception without costs, but ordered the plea in reconvention against Osmond to be expunged from the defendant's plea.

Postea (28th June, 1834).—This day, in the course of his evidence, the plaintiff put in the receipt-book of the late Vendue Department, containing the following entry, which was proved to be signed both by the plaintiff Robertson and by Ziervogel:

"21st March, 1815.

"Received of the Vendue Master the sum of 8,175rds. 4sk., being, with the kusting brief, the full amount of the vendue rolls. Ziervogel, Robertson, and Osmond, *q.q.* Mr. Naude, dated 4th November, 1813, 3,063rds, 2sk., and 21st April, 1814, 5,112rds. 2sk.

"WM. ROBERTSON.
"E. B. ZIERVOGEL."

Plaintiffs then proposed to put in evidence an entry made by Reitz, then Deputy Vendue Master, in the ledger of the Vendue Department, to show that the money mentioned in the receipt was paid to Ziervogel alone, and not to Ziervogel and Robertson, as stated in the receipt.

Brand objected that this entry was not evidence.

The *Attorney General* and *Cloete* maintained that this ledger was a public book, and therefore that on the principle of the cases stated in *Phillips, vol.* 1, *p.* 394, *part* 2, *cap.* 6, entries in that book were evidence.

The Court held that admitting the book to be of the nature of the public books mentioned in *Phillips, part* 2, *cap* 6, and that entries in it might in certain cases be evidence of certain facts, yet that this case did not come within the principles of the English cases, and that no entry in it could be admitted as evidence that money was paid to *a certain person.*

N.B.—It appeared from the face of the book that it was kept merely for the purpose of showing the dates of payments.

Postea (30th June, 1834).—The Court absolved the defendant from the claim of the plaintiffs in convention, and gave judgment for her for the £99 19s. 6d. claimed by her in reconvention, with costs.

1833. Dec. 3. 1834. June 10. „ 28. „ 30.

Robertson and Osmond, Executors of Naude, vs. Executrix of Ziervogel.

Postea (30th June, 1834).—On the petition of the Widow Ziervogel, in respect of the above judgment, the private estate of Naude in this Colony was adjudged to be sequestrated, notwithstanding it was opposed by Robertson and Osmond, the executors thereof, on the ground that Naude had also an estate and executors in England.

ALTENSTEDT *vs.* VON LUDWIG AND ANOTHER, AS SPECIAL AGENTS OF VAN AMSTEL.

Pleading. Agents. Foreign. Principals. Grounds of action.

In an action against agents, it is requisite to aver grounds on which the action is maintainable against them as agents, and not sufficient to aver that they are agents the cause of action being against the principals in a foreign country.

1833. Dec. 5.

Altenstedt vs. Von Ludwig and Another, as Special Agents of Van Amstel.

Defendants made no appearance.

Cloete was proceeding to open the case, but was stopped by the Court, on the ground that the declaration did not aver any ground upon which action could be maintained against the defendants, as the special agents of Van Amstel and Ludwig, of Amsterdam, the real defendants, against whom the action was brought, further than a mere allegation that they were the special agents of the said Amstel and Ludwig.

Whereupon *Cloete* withdrew the record.

(*Vide infra, Orphan Chamber* vs. *Bailey, 27th February*, 1834.)

SILBERBAUER, Q.Q. DAVIS, *vs.* MCDONALD AND SUTHERLAND.

1833. Dec. 10.

Exception that a plaintiff is an uncertificated insolvent, therefore cannot maintain action as a mandatory, ruled.

[Vol. II, Part 2, p. 184.]

ORPHAN CHAMBER *vs.* BAILEY.

Exceptio non-qualificatæ.

Where plaintiffs introductorily alleged that they sued in their official capacity as administering the estate of one Dunn, but the body of the declaration did not further aver facts to found title, exception allowed.

1834. Feb. 27. — Orphan Chamber vs. Bailey.

The *Attorney-General*, in support of the exception which had been pleaded by the defendant, argued that as the plaintiffs in their declaration merely stated in the introductory part of the declaration that the defendant was summoned to answer the Orphan Chamber in their official capacity as administering the estate of the late Johan Martin Dunn, and did not aver they had had, or state any fact showing that they had, a title so to administer that estate, the exception taken to the declaration ought to be allowed.

Exception allowed with costs, with leave to plaintiff to amend his declaration on payment of costs.

(*Vide Aldenstedt vs. Ludwig, supra.*)

STILL *vs.* WEEKS.

Construction of the word "such" in declaration.

1834. June 26. — Still vs. Weeks.

In this case, which was undefended, the declaration set forth that "defendant agreed to secure the due payment of the sums aforesaid by passing a mortgage bond on the said house and premises *with two personal securities*," &c., &c., "and that the plaintiff had requested defendant to accept transfer of the said house and premises, and to pass a mortgage bond secured as aforesaid," &c., &c., and that defendant hath failed or neglected so to do. Wherefore plaintiff prays that "defendant may be decreed to accept transfer of the said house and premises and to pass *such bond as aforesaid.*"

Under these circumstances, the Court held that the claim made by plaintiff was only that defendant should pass a bond mortgaging the house and premises, and did not include a claim that it should also be secured by the obligation of two personal sureties, that the word "such" referred only to the nature of the bond, and that the words "mortgage bond on the said house and premises *with two personal securities*" did not necessarily imply that the obligation by the two personal securities should be *in gremio* of the bond, and gave judgment accordingly.

RENS *vs.* BAM'S TRUSTEES.

Exception of submission to arbitrators overruled.

[Vol. II, Part 2, p. 3.]

RYNBACHS *vs.* RYNBACH, EXECUTOR OF MORRIS.

Declaration. Title. Surplusage.

Where plaintiff's Christian name DANIEL *was correctly stated in the summons and in the body of the declaration, but was erroneously given as* DAVID *in the title of the declaration, the Court overruled an exception, holding that the title formed no part of the declaration, but was surplusage.*

1835. May 19. Rynbachs *vs.* Rynbach, Executor of Morris.

In this case the defendant's name was Daniel, and his name was correctly stated in the summons and in the body of the declaration, but prefixed to the declaration was the following title:

"In the Supreme Court, between C. C. Rynbach, &c., plaintiffs, and *David* Rynbach, &c., defendant, Plaintiffs' declaration and claim.

"Wednesday, the 18th day of March, 1835.

"Colony of the Cape of Good Hope, *To wit*,

"*Daniel* Rynbach, the defendant in this suit, has be summoned," &c., &c.

The Court (WYLDE, C.J., absent) overruled the ception with costs, holding that the above title formed part of the declaration, and was surplusage.

WYLDE *vs.* WYLDE.

July 6. *Plea: an admission in, by wife, of having committed a is not sufficient proof per se of the adultery.*

[Vol. I, p. 269.]

MARTHEZE *vs.* VAN REENEN.

Veritas convitii must be specially pleaded. 1835 Aug. 11.

[Vol. III, Part 1, p. 14].

'ed *vide Noodie vs. Fairbairn, post p.* 364).

SMITH *vs.* HOUSE.

Exceptio non-qualificatæ disallowed. Aug. 31

[Vol. I, p. 77.]

BRATH *vs.* MULDER.

'here an action is brought against the husband in respect of payment of money to the wife, to whom he was married by antenuptial contract, it is necessary to allege that the wife received the money by the order and consent of the husband. 1836. Aug. 19.

[Vol. I, p. 207.]

ILES *vs.* JONES AND OTHERS.

Form of action between partners. Aug. 26. Nov. 26.

[Vol. II, Part 2, p. 208.]

KIENER *vs.* WATERS.

Marine Assurance.

declaration to recover the amount of a policy of marine assurance must allege an actual loss, and during the period specified in the policy.

1836. Nov. 8.

Kiener *vs.* Waters.

This action was brought by the plaintiff to recover from e defendant, an underwriter, the sum of £200, assured by e defendant on the ship *James* and her cargo for and during e term of three months, commencing at noon on the 2nd July, 1835, and to continue until the 2nd October, 1835, thout any limitation as to her voyage.

1836. Nov. 8.

Kiener vs. Waters.

The declaration set forth that the said vessel sailed from Table Bay on a trading voyage to the east coast of Africa on the 5th of August, 1835, and that she had not returned to Table Bay before the said 2nd October, 1835, or up to the commencement of the present action (24th September, 1836), and that she was supposed to be lost.

To this declaration the defendant excepted that the matters therein set forth were not sufficient in law for the plaintiff to maintain his action.

This day, the *Attorney-General*, in support of the exception, argued that the declaration was insufficient, inasmuch as it merely alleged that the vessel was supposed to be lost, and did not allege either that the vessel was actually lost or that the loss had taken place within the period specified in the policy; and quoted *Marshall* (*Edit.* 1823), *Vol.* 2, *p.* 698, *Vol.* 1, *p.* 338; *Chitty*, 2, 182.

Cloete argued *contra*.

The Court sustained the exception, with costs.

ROGERSON, N.O., *vs.* MEYER AND ANOTHER.

1837. May 23. Dec. 8.

Bartman bound himself by bond in a sum of £500, *and M. and B. bound themselves as sureties for* £250 *each. B. was summoned individually for* £250, *without mention of M. in the summons. M. was separately summoned in the same way, without mention of B. The declaration was filed against both as if they had been co-defendants in one summons. Exception was taken to the declaration on the ground of variance, and sustained by the Court.*

The exceptio ineptæ cumulationis personarum, being a dilatory exception, must be pleaded initio litis, and is not therefore a ground of absolution from the instance.

An exception of insufficient assignment of breach of bond must also be pleaded initio litis.

The non-excussion of the principal debtor must be excepted initio litis before joining issue on the merits.

[Vol. II, Part 1, p. 38.]

MOODIE *vs.* FAIRBAIRN.

May 16. " 30.

Facts tending to mitigate damages may be given under the general issue without being specially pleaded.

[Vol. III, Part 1, p. 14.]

S. A. ASSOCIATION *vs.* VOGET'S EXECUTORS.

Exceptio non-qualificatæ to title of tutors sustained. 1837. Sept. 7.

[Vol. III, Part 2, p. 79.]

STILL *vs.* NORTON.

Compensation must be specially pleaded. 1838. May 22. „ 29.

[Vol. II, Part 2, p. 209.]

BRINK, Q.Q. ELY, *vs.* SMUTS.

laration bad for want of sufficient statement of the cause of action. Aug. 23. 1839. Feb. 19.

[Vol. III, Part 2, p. 81.]

MYBURGH *vs.* DE VILLIERS.

Verbal injury.

Exception of non-confession or avoidance sustained. Feb. 14.

[Vol. III, Part 1, p. 20.]

DAVIS, EXECUTOR, *vs.* RENS.

Læsio enormis must be specially pleaded. June 1.

[Vol. II, Part 2, p. 15.]

BROEKMAN, EXECUTOR OF DURR, *vs.* RENS.

'urchase and sale. Læsio enormis. Pleading. Election, right of.

here the sum at which certain property was bought by V. from D. was below half the real value of such property at the time of sale, and it was moreover proved that D. at the

time of the sale was of infirm mind, the Court, upon both grounds, set aside the sale and its consequences.

In answer to the plaintiff's declaration praying the rescission of the sale, the defendant who pleaded the general issue, had maintained that the plaintiff should have alternately pleaded the setting aside the sale or the impletion of the price. HELD, *that it was open to defendant, in his plea, to have elected which he chose, but not having elected the impletion, and tendered the difference, he had lost his right of election.*

1839. Nov. 14.

Broekman, Ex. of Durr, vs. Rens.

This action was brought by plaintiff in order to have the contract of sale which by the judgment of the Court in the former action (*vide Vol.* 2, *Part* 2, *p.* 15.), had been found to have been entered into between her deceased husband, Durr, and the defendant rescinded and declared null and void, on the ground of *enormis læsio* thereby occasioned to said Durr, in respect that the true value of the property sold was £1,515, and the price stipulated in the contract only £650.

The defendant pleaded the general issue. After the evidence had been led, *Musgrave*, for plaintiff, quoted *Burge's Colonial Law, Vol.* 2, *p.* 472; *Van der Linden, p.* 275, 467, 468; *Ordinance, No.* 72, § 3 (as to what imbecility of mind disqualifies a witness).

Cloete, contra, quoted *Grotius Inl.*, 5, 52, and maintained that plaintiff was bound to have made an alternative prayer in her declaration for setting aside the sale or to have the price made up to the true value, and quoted *Voet*, 18, 5, 17, 18.

The Court held that it was proved that the value of the premises at the time of the sale in April, 1839, was *above* £1,250 (50,000*f.*), and that therefore the price stipulated in the contract was *infra dimidium* of the true value, and that at the time the sale was so made Durr was in such an infirm state of mind that he did not know what the true value of the property was, and gave judgment for plaintiff with costs, setting aside the sale, with all that had followed thereon.

The Court also held that although it was competent for the defendant to have elected whether he would allow the sale to be set aside or to pay the difference between the stipulated price and the real value, yet that not having made any tender in his plea to pay the real value, and having joined issue solely on the issue whether the plaintiff was entitled to have the sale set aside on the grounds set forth in the declaration, he had lost his right of election.

N.B. In the declaration plaintiff's counsel had alleged that defendant, taking advantage of the necessities of Durr had *unconscientiously and ungenerously* persuaded Durr, &c.

The Court held the word "ungenerously" to be irrelevant, but that it was not of sufficient importance to make it necessary to the Court to expunge it *proprio motu*, as the defendant had not objected to it.

1839. Nov. 14.

Broekman, Ex. of Durr, *vs.* Rens

BREDA'S TRUSTEES *vs.* VOLRAAD.

Dec. 6.

Declaration alleged a bill of exchange, which it was sought to set aside as an undue preference, to have been made by the insolvent in favour of the defendant. On evidence it appeared that the bill, which was an accommodation one, was actually made by insolvent in favour of one B., and by him endorsed and discounted by the insolvent for the defendant. HELD, *that the description declared on was sufficient to cover the transaction proved.*

[Vol. II, Part 2, p. 238.]

BECK *vs.* ALDUM AND ANOTHER.

1840. May 21.

Verbal Injury.

Plea of justification insufficiency of.

[Vol. III, Part 1, p. 21.]

LIVINGSTON & Co. *vs.* DICKSON, BURNIE, & Co.

May 25. June 24.

Objection to title of plaintiffs must be by exception, and not under the general issue.

[Vol. II, Part 2 continued, p. 239.]

STEGMANS *vs.* HOFMEYR.

The plaintiffs alleged that the defendant H. was a notary public, employed by the late Widow Z. to draw her will. That the plaintiffs were duly proposed and duly intended to be co-executors, but that the defendant had wrongfully, &c., refused to insert their names; wherefore, having been so deprived of their fees, they brought this action. Defen-

dant excepted that the declaration did not state by whom the plaintiffs were so proposed or intended, nor to whom the defendant refused; and the Court sustained the exception.

The declaration in this case set forth that the defendant, being a notary public in Cape Town, was on the 19th June, 1840, employed in his said capacity to prepare and draw up the last will and testament of the late Widow Zibee, now deceased, for certain reasonable fees and reward to be thereafter paid to said defendant,—that at the time of the preparation of the said will the plaintiffs were duly proposed and offered as and duly intended to be co-executors of the said will and co-administrators of the estate of the said testatrix, with P. J. Sandenberg, now an executor of said will and administrator of said estate,—that the defendant was duly requested to prepare and draw up the said will in that behalf, but that the defendant then and there, improperly erroneously, contrary to his duty as a notary public, and without any warrant or colour of law, refused to insert in the said will the names of the plaintiffs as such co-executors and co-administrators as aforesaid; the defendant then and there alleging, and declaring improperly, erroneously, contrary to his duty, and without any warrant or colour in law, that there existed an objection and impediment in point of law to the nomination of the plaintiffs as such co-executors and co-administrators as aforesaid; in consequence of the cause or ground so assigned by him for such refusal, and on no other account and for no other reason whatever, it came to pass that the plaintiffs were not nominated and appointed in and by the said will to be such co-executors and co-administrators as aforesaid, by means of which illegal conduct of the defendant in the premises, the plaintiffs have wholly lost and been deprived of certain large fees, gains, profits, and emoluments, which, but for such illegal conduct of the defendant as notary public, they would, as such co-executors, &c., have had and enjoyed, by reason where they have sustained damages to the amount of £200, whi sum they pray the defendant may be adjudged to pay th with costs.

The defendant excepted to this declaration on the fol ing grounds: that it is not drawn with proper certa inasmuch as it does not appear thereby by whom the d dant was employed to prepare the said will, or by who names of the plaintiffs were proposed as executors, whom the defendant refused to insert their names as and that the said declaration is in other respects un informal, and insufficient.

Brand, for defendant, this day argued in support of the exception. 1840. Nov. 30.

The *Attorney-General, contra*, quoted 16 *East., p.* 39, to show the meaning and legal effect of the word "duly." Stegmans vs. Hofmeyr.

Musgrave replied, and quoted 1*st Chitty on Pleading, p.* 271.

The Court sustained the exception, with costs.

The case was not again brought before the Court.

Bailey and Another *vs.* Chiappini.

Justification pleaded after a full apology destroys the effect thereof, and is a deliberate repetition of the libel. 1841. May 18.

[Vol. III, Part 1, p. 33.]

Dixon *vs.* Grainger.

Exception to a plea, for uncertainty allowed, where, in answer to an action for wages of a shipmaster, the defendant opposed a general claim for damages sustained through the master's neglect, without giving particulars thereof.

This was an action for wages brought by plaintiff, the master, against the defendant, the owner, of the bark *Courier*. The sum claimed was £89 17*s.* 3*d.* 1842. Feb. 24. Dixon vs. Grainger.

The defendant pleaded that he did not owe more than £36 2*s.* 5*d.*, which he had tendered with interest, and that, therefore, he was not liable in costs. And as a further plea as to the balance of £53 14*s.* 10*d.*, demanded by plaintiff, the defendant pleaded that plaintiff ought not to maintain his action, because the defendant did not, in his said employment as master of the *Courier*, take due and proper care of the interest of the defendant, as he was in duty bound to do; but that the defendant, by and through the carelessness, neglect, and improper conduct of the plaintiff in his said employment, has sustained damage to the amount of £50.

To this plea the plaintiff excepted on three grounds: 1st, that it purports to be a plea of compensation or set-off, while neither is the debt or demand, which is sought to be set-off, a liquid sum, nor a demand or debt of the same nature with that sued for by the plaintiff, but, on the contrary, purports to be in the nature of unliquidated damages, and to arise from certain matters and things incapable of being pleaded in compensation against the cause of action in the declaration; 2ndly, that while the plea purports to cover the whole of the said balance claimed, it does not cover the

1842. Feb. 24.

Dixon vs. Grainger.

same, but only a part thereof, and contains no averment that the sum covered by the said plea (though less than the sum in the declaration mentioned and demanded) is the sum or is equal to the sum, which the plaintiff, but for the matter of the said plea, would have been entitled to recover, and therefore the plaintiff could not take issue upon the said plea without giving up a certain part or portion of his demand; 3rdly, and for that it does not appear from the said plea when, where, or in what manner the plaintiff was guilty of the carelessness, neglect, and improper conduct alleged against him in the said plea, nor are there any instances of the same stated in the said plea, nor does the said plea in any manner enable the Court to judge whether or not the matter and things by the defendant alleged are sufficient in law to enable the defendant to recover any damage, nor enable the plaintiff to know what matters and things in the way of carelessness, neglect, or improper conduct are meant to be brought forward at the trial of this suit or to make preparation for rebutting the charge made, and for that the said plea is wanting in reasonable certainty, and is in other respects informal.

The *Attorney-General*, in support of the first exception, quoted *Voet* 16, 2, §§ 17, 18; *Censura Forensis*, 4, 36, 3; *Bell's Commentary, chap.* 4, § 2, *part* 1; *Chitty on Pleading, vol.* 1, 558.

In support of the second exception, he argued that according to the terms of the plea excepted to, the balance left in dispute was £52 14*s.* 10*d.*, which was not wholly covered by the £50 of damage alleged to have been sustained in consequence of the alleged negligence of the plaintiff, and yet in respect of the £50 the defendant had denied the whole claim for £53 14*s.* 10*d.*, and in support of the third exception he quoted *Stephen on Pleading, p.* 384.

Musgrave, contra, in answer to the first exception, and to show that he might have proved under the general issue, without setting it forth in his plea, that which he had pleaded, quoted 2 *Starkie on Evidence*, 944. The pleadings in *Silberbauer* vs. *Brutt*, 27*th February*, 1838; 7 *East's Reports*, 484; 3 *Campbell*, 451; *Rocoe's Evidence, p.* 283; 2*nd Chitty, p.* 921 *and* 374, 652; 3*rd Chitty*, 963, 1,158, 1,184; 1*st Chitty*, 268, 565, 268. In answer to the second exception, he quoted *Chitty* 1, 553. And, thirdly, argued that the plea excepted to was framed with sufficient certainty.

The *Attorney-General* replied, and quoted 2*nd Chitty, p.* 246, 233, 537.

The Court allowed the exception in respect of the uncertainty excepted to, with costs.

Defendant allowed to file a new plea,—*vide postea*, 10th May, 1842.

NORDEN *vs.* BONNIN'S TRUSTEES.

1842. Aug. 30.

When purchases by trustees in insolvency are not null and void ab initio, but voidable according to the circumstances, such circumstances must be specially pleaded.

[Vol. II, Part 2, p. 38.]

CHIAPPINI & CO. *vs.* EAGAR AND OTHERS, TRUSTEES OF JAFFRAY.

Exceptions overruled, as containing matter of replication, and not exception.

1843. March 13.

Chiappini & Co. *vs.* Eagar and Others, Trustees of Jaffray.

This was an action to recover certain moneys and securities for money.

Plaintiffs declared that before the surrender of Jaffray's estate as insolvent, they had, at sundry times delivered, or caused to be delivered to him, as their factor or agent, divers goods and merchandise, to be sold and disposed of on their account, for a reasonable commission; that Jaffray did so sell and dispose of those goods to various persons on account of plaintiffs, and that at the time of his surrender there were certain sums of money due by parties to whom he had sold those goods, as well as certain bills, promissory notes, and other securities, which had come into his possession solely on account of, and in payment for, those goods,—which sums of money, bills, &c., were distinguishable from the other assets in his estate; wherefore plaintiffs prayed that defendants, in their capacity of trustees of the estate, might be decreed to pay them the said sums of money, and deliver over to them the said bills, promissory notes, and other securities.

The defendants pleaded, 1st, the general issue; 2ndly, that before the commencement of this suit, the plaintiffs had only proved under the sequestration of the estate for the debt now sought to be recovered, and had thereby made their election to take the benefit of the said sequestration, and thus relinquished their remedy by action. 3rdly, defendants pleaded that, assuming certain goods and merchandise to have been delivered over by plaintiffs to Jaffray, they were so delivered to him on his personal credit and liability; that the sums for which they had been sold had been accounted for by Jaffray to plaintiffs, and that the balance was then treated and considered by them as his personal debt.

1843.
March 13.

Chiappini & Co. vs. Eagar and Others, Trustees of Jaffray.

Plaintiffs joined issue on the first plea, and excepted to the second plea of defendants, on the following grounds, viz.: 1st, That it assumes that, by the law of the Colony, the act of proving by a principal upon the insolvent estate of his factor for the value of goods delivered by the principal to be sold on commission by the factor precludes the principal from afterwards claiming such of the goods as are found to have remained and to be still distinguishable from the assets belonging to the insolvent estate, and amounts to an absolute election by such principal to claim as a creditor upon the said insolvent estate, as well for the value of such of the goods as remain, specifically distinguishable from the estate of the factor, as for the value of such of the goods as have become inseparably mixed up with or merged in the said estate; whereas the plaintiffs submit that such is not the law of this Colony. 2nd. And because the present action is not brought for the recovery of a debt due by the insolvent estate, but for the recovery of certain assets which are alleged not to belong to the said estate at all, and until the decision of this action it cannot appear whether the whole or any, and if so, what part, of the said proof of debt should be expunged. Plaintiffs also excepted to the third plea of defendants on the ground, 1st, that it neither admits, denies, nor confesses and avoids the matters mentioned in the declaration; 2nd. And because the said plea—if it be intended as a plea that the goods and merchandise mentioned in the declaration were actually sold and delivered by plaintiffs to be sold by him as the factor or agent of plaintiffs—is uncertain in its form, and merely amounts to the general issue or denial by the defendants first pleaded; 3rd. And because the said plea—if it be intended as an allegation that Jaffray, by reason of a *del credere* or some similar commission to be paid to him, incurred a personal responsibility to the plaintiffs, for the sums for which, as factor or agent, he should sell the goods and merchandise to third parties—is not by law an answer to this action inasmuch as, by law, the liability of a factor or agent, arising out of any such *del credere* commission, to represent, or stand in the place of a principal debtor, in accounting with the parties whose goods and merchandise he has disposed of, does not deprive such parties of their right to reclaim, as against the insolvent estate of such factor or agent, such of their said goods and merchandise as remain distinguishable from the assets of the said estate, or alter or affect the legal principles applicable to the rights of parties who have delivered goods and merchandise to their factors or agents generally, in case of the insolvency of the latter.

On the 13th instant the Court heard counsel on the exceptions; the *Attorney-General* appearing for the plaintiffs, and *Musgrave* for defendants.

The first exception taken by plaintiffs was to defendant's second plea, namely, that plaintiffs, by having proved a debt under Jaffray's sequestration for the full amount of the outstanding debts, bills, and other securities now claimed by them (being the same debt for the recovery of which this action is brought), did thereby make their election to take the benefit of the said sequestration and to relinquish their remedy by an action against the trustees, founded on the same cause of debt, and were therefore barred from maintaining this action. The plaintiffs excepted that this plea was insufficient in law to bar plaintiffs from maintaining their action, 1st, Because the defendants assumed the law of the Colony to be that alleged by them, whereas plaintiffs submitted that the same is not the law of the Colony. On this point the *Attorney-General* quoted *Storey, Equity Juris., vol. 2. p.* 334.

Musgrave, contra, quoted 3*rd Barn & Alderston, p.* 126; 3*rd. Maule & Selwyn, p.* 78.

The Court held that the denial by plaintiffs of the truth of the conclusion in law, founded by defendants on facts averred by them, is matter of replication, and not of exception, and, therefore that the plaintiff's exception, so far as it rested on the first ground stated in it, is inept and irregular, and they overruled it accordingly. (*Vide Nel. vs. Nel, 29th Nov.*, 1841.)

The second ground on which plaintiffs' exception to the second plea was founded, was, because, as appears *ex facie* of the record itself, the action in the declaration mentioned is not brought for the recovery of a debt due by the insolvent estate, but for the recovery of certain assets alleged not to belong to that estate, but to be the property of the plaintiffs, until the decision of which it cannot appear whether the whole or any, or if so, what part, of the said proof of debt should be expunged; consequently, that—as the conclusion in law maintained by the defendants in their second plea is by them in it rested solely on the averment that this action was brought *for the same debt* for which they had proved under the sequestration—it appears *ex facie* of the record that the facts they have averred are insufficient to support the said conclusion in law which they have maintained.

The Court, solely on these grounds, and without reference to the other matters stated and founded on in support of this exception, sustained it, and ordered the second plea to be expunged from the record.

1843. March 13.

Chaippini & Co. vs. Eagar and Others, Trustees of Jaffray.

As to the first ground of exception taken by plaintiffs to defendant's third plea, as insufficient in law, because the said plea neither admits, denies, nor confesses and avoids the matters in the declaration mentioned, nor any of them,—

The Court held that the exception, in so far as it rested on this ground, was unfounded.

As to the second ground of exception to the third plea, namely, that the said plea—if it be intended as a plea that the said goods and merchandise were actually sold and delivered by plaintiff's to Jaffray, and not merely delivered to him to be sold by him as the factor or agent of the plaintiffs—is uncertain in its form, and amounts, moreover, only to the general issue or denial by plaintiffs first pleaded,—

The Court held that the meaning of the third plea was certain, unambiguous, and intelligible, and that this plea could not bear the construction put on it by plaintiffs; and therefore that the exception, in so far as it rested on this ground, was unfounded.

The Court held that the third ground on which the exception was founded amounted to a denial by plaintiffs of the truth of the conclusion in law founded by the defendants on facts averred by them, and was, therefore, matter of replication, and not of exception; and that the exception, in so far as it rested on this ground, was inept and irregular. On these grounds the Court overruled the plaintiffs' second exception.

Ordered that defendant's plea be amended by expunging the second plea by them therein pleaded; and the plaintiffs file their replication to defendants' plea as amended.

Costs of the exceptions to be cost in the cause.

[*Vide* Vol. II, Part 2 (continued), p. 192.]

BEKKER *vs.* BEKKER'S EXECUTOR.

1844. Nov. 26.

Where an action was brought in a Circuit Court to set aside a will, and the judgment of the Circuit Court was subsequently appealed from to the Supreme Court, the appellant sought, as one ground of setting aside the judgment of the Circuit Court, to object that some of the heirs interested in the will had not been made parties to the appeal. HELD, *that this should have been excepted in the Court below initio litis, and could not now be entertained.*

[Vol. II, Part 4, p. 436.]

De Vos *vs.* Spaarman and Wagner.

Summons. Declaration. Variance.

After pleadings closed, the Court refused to allow a plaintiff to insert in his declaration certain words which he alleged had been accidentally omitted from the declaration, although inserted in the summons.

1845. May 27. — De Vos vs. Spaarman & Wagner.

In this case, *Cloete*, for the plaintiff, stated that the cause of action was stated in the summons to be for certain articles therein specified, sold and delivered to the defendants, and for tinsmith's work done and performed for the defendants, by plaintiff;—but that by accident the words italicised were omitted in the declaration, and moved that these words should be inserted in the declaration as they stood in the summons, so as to make the declaration cover the demand for the value of the work done and performed, viz.: 16*s.* 6*d.*

Ebden opposed the motion, which, if granted, would have the effect of adding a new count to the declaration, as incompetent at this stage of the proceedings after a plea and replication had been filed and pleadings closed.

The Court refused the motion.

Dreyer *vs.* Van Reenen.

Trespass. Pleading.

In action against V. R. for trespass, defendant pleaded the general issue. At the trial defendant justified his acts by proof that he was member of a Road Board, and had authority in that capacity to do what he had done. Held, *that not having specially pleaded his capacity and special consequent authority, he could not so justify.*

Liability of Road Board superintendent for acts of his servants within the scope of his authority.

Dec. 9. — Dreyer vs. Van Reenen.

In this case the plaintiff's declaration set forth that the defendant, on or about the 9th December, 1844, wrongfully and unlawfully entered and trespassed upon the place called Alphen, situated in the Cape Division, the property of the Plaintiff, and did, as well by himself as by his servants, great damage to the said property, and did cut down or cause to be cut down a large number of trees and underwood, the property of the plaintiff, consisting of silver, fir, oak, and other trees and shrubs, whereby the plaintiff sustained

damage to the amount of £100, which he prayed the defendant might be condemned to pay, with costs.

Van The defendant pleaded the general issue.

It was proved that the plaintiff was proprietor of the place called Alphen, and that the defendant, who was a member of the Cape Divisional Road Board, had been specially deputed, in connection with the Road Board, superintendent, to lay out a line of road, in the execution of which duty he had done the damage complained of.

The *Attorney-General* for plaintiff, maintained that—as it has not been specially pleaded that defendant was a commissioner of the Road Board, clothed with all the legal authority and powers of the Road Board, and that the Road Board had legal authority and power to do that which was done,—that defence could not now be pleaded, even although the defendant were clothed with the Road Board's privileges, and although the Road Board had legal authority to do the act complained of,—both of which positions he denied; and quoted *Chitty, vol.* 1, *p.* 505. Neither could the defendant plead that what he had done was done with the leave and licence of the plaintiff, because that defence was not specially pleaded. 3rdly,—That defendant was liable for whatever was done by those acting under his authority in execution of that which he had directed to be done, in the line of the employment directed, although he had neither personally assisted in doing, or expressly ordered to be done, the illegal act complained of by the plaintiff. (*Voet* 27, 10, 3.) 4thly,—That although the whole Board had been present and concurred with the defendant in what he did, yet that the plaintiff had a right to bring his action for what had been done, against the defendant alone, or any other member of the Board, leaving the member singled out as the defendant to his recourse against those who acted with him as wrong-doers. He maintained that it was proved by the evidence of Capt. Fielding, the Road Board Superintendent, even if it stood alone, that he was employed, and acted in everything he did under the order and authority of the defendant, the commissioner of the Board; and that the trespass which he committed was actually necessary to enable him properly to perform the which the defendant had ordered him to do. (*Voet* 46, 2, 1

Ebden, for the defendant, maintained that whatever trespass was which had been committed on the plaintiff property, that trespass was not committed by the defendant, but by Capt. Fielding personally, or by the B under whose authority Capt. F. acted. He quoted *nance No.* 8, 1843, *sections* 9, 10, *and* 45, and maintained the Road Board consequently had a right to go on plaintiff land to mark out a road. He maintained, therefore

what defendant is proved to have done was not a trespass, or even if it was, it was so slight that the judgment should be a shilling damages, without costs. That the trespass which was committed in cutting down the trees was not done by defendant, but by Fielding, the servant of the Board, who, having gone beyond the scope of his authority, only rendered himself, and not the Board, liable for the consequences of what he did.

1845. Dec. 9. Dreyer vs. Van Reenen.

The Court unanimously, on all the grounds maintained by the plaintiff, gave judgment for the plaintiff £10 damages and costs.

[NOTE.—The functions of the late Road Boards have now (1871) devolved on the Divisional Conncils.]

ROSE *vs.* CLOETE.

Sale and purchase. Absolution from the instance where plaintiff founded in his pleadings on a certain contract of sale, which contract the evidence proved to have been put an end to by the parties, and a new contract entered into.

1847. June 11. Rose vs. Cloete.

The declaration set forth that on the 22nd May, 1845, plaintiff sold and delivered to the defendant two horses for the sum of Rds. 450, and that the defendant paid to the plaintiff, in part payment of the said sum, Rds. 216 5 2, and for the balance, to wit, Rds. 232 2 4, undertook, promised and agreed, to and with the plaintiff, to deliver to the plaintiff, at the stores of Mr. Ebden, in Cape Town, within a reasonable term from the said 22nd May, 1845, two pipes of wine according to sample. That the plaintiff has always been ready and willing to receive the said two pipes of wine, and has often requested the defendant to deliver the same, but that although a reasonable time hath elapsed since the aforesaid agreement, yet that the defendant has refused and neglected to deliver, and has not delivered, the said two pipes of wine, and thereby the plaintiff has lost and been deprived of profits and gain to the extent of £25, which would have accrued to the plaintiff by the delivery of the said wine; wherefore the plaintiff prays the defendant may be condemned to pay the plaintiff the said sum of £25, with costs.

The defendant, in his plea, admitted the sale to him by the plaintiff of the two horses for the sum of Rds. 450, and that he had paid to the plaintiff the sum of Rds. 216 5 2, but denied all and singular the other allegations in the decla-

1841. Cloete.

ration, and for a further plea (in case the plaintiff shall succeed in proving the matters by the first plea of the defendant traversed and denied), the defendant alleged that after making the contract to deliver the two pipes of wine, as in the declaration mentioned, the defendant before the said reasonable time had elapsed was ready to deliver, and would have delivered the wine, but that the said Mr. Ebden informed him he could not or would not receive the said wine for want of room in his store; after which refusal the plaintiff, by his agent, P. F. J. Korsten, in December, 1845, agreed with the defendant that the wine should not be delivered until it should have been mixed by the defendant with certain spirits, and tasted and approved by the said Korsten; and that the defendant did, with all due and proper dispatch, mix the said wine with the said spirits, and did, thereafter, without any undue delay, give notice to the said Korsten to repair to the premises of the defendant to taste the wine, who thereupon wholly declined to receive the said wine, which wine the defendant has been at all times and still is, ready to deliver at Mr. Ebden's, or elsewhere in Cape Town, if so requested by the plaintiff.

The plaintiff, in his replication, joined issue on both pleas.

At the trial, after the plaintiff had closed his evidence, the *Attorney-General*, for the defendant, moved for an absolution from the instance, on the ground that the plaintiff had failed to prove that the defendant had agreed to deliver the wine within a reasonable time, or at the store of Mr. Ebden; consequently, that the contract which plaintiff had proved to have been made was not the contract alleged in the declaration.

2ndly. That as by the contract, as proved, no period of delivery was fixed, it must be construed as stipulating that the delivery was only to be made on the special request of the plaintiff, and that as a special request by the plaintiff was thus necessary to put the defendant in default, it was necessary, to support the action, that a special request should have been alleged in the declaration, and that a general averment that the plaintiff had often requested was not sufficient to supply the wants of the averment of a special request. And quoted *Chitty on Pleading* (*Edit.* 1836), *p.* 16; 5 *Term Reports*, 409; *Roscoe on pleading*, *p.* 61; and *Harris vs. Ruthven*, decided in this Court 11th August 1840.

Ebden, for the plaintiff, argued *contra*.

The Court gave no decision on any of the points raised by the defendant. But—in respect that it had been proved by the evidence of the plaintiff's agent, Korsten, that after

communications between him and the defendant and plaintiff, it had been agreed by him and the defendant in the beginning of December, 1845, that the defendant should deliver the two pipes of wine in question at the stores of Dunell & Stanbridge, in Cape Town, in the beginning of January, 1846, and that the wine not having been delivered in January, he had, by the instructions of the plaintiff, refused to receive it in February, 1846, when the defendant informed him that the wine, was in readiness to be delivered,—the Court held that by this new agreement in December, 1845, the parties had abandoned and put an end to the original contract, whatever it might have been; and that the plaintiff for the purpose of recovering damages for the failure of the defendant to perform the new agreement, could not competently found on the original contract, which had been put an end to by the parties, as the ground of the action; and therefore absolved the defendant from the action, with costs.

1847. June 11.

Rose *vs.* Cloete.

SMITH *vs.* SKINNER.

Prayer for general relief, effect of, when pleaded.

Dec. 2.

[Vol. III, Part 2, p. 188.]

CHAPTER IV.

EVIDENCE.

GREEFF *vs.* VERREAUX.

1829. March 20. *A foreign instrument admitted as proof of age.*

[Vol. I, p. 151.]

BARKER *vs.* BARKER.

Sept. 25. *Depositions taken in England as to the birth there of a child, received in proof of adultery.*

[Vol. I, p. 265.]

KORSTEN *vs.* CUYLER.

Dec. 23. *Declaration on oath before a notary by person on death-bed not admissible.*

[Vol. I, p. 430.]

HORSTOCK *vs.* BONIFACE AND OTHERS.

1830. Sept. 7. *In an action of libel, the evidence of witnesses who had read the libel and had not seen its application to the plaintiff, is inadmissible.*

SUTHERLAND *vs.* SNELL.

1831. March 31. *A judgment obtained against an office-holder for a deficiency in the accounts of his office on his own admission in an action to which his surety was no party, is no evidence to warrant provisional sentence for the amount of such deficiency against the party who had bound himself as security for any deficiency which might be caused by the default of such office-holder.*

[Vol. I, p. 69.]

HOVIL AND MATHEW *vs.* POULTNEY. 1832. Dec. 31.

Proof of presentment of a bill of exchange by the production of a notarial protest for non-payment in which presentment is alleged, cannot in a provisional case be negatived by parole evidence.

[Vol. I, p. 14.]

SUTHERLAND *vs.* MCDONALD.

A document which has not been scheduled and annexed to the plea, as required by Rule of Court 132, *cannot be put in evidence.* 1833. Feb. 4.

[Vol. III, Part 1, p. 6.]

MELCK *vs.* ALBERTUS.

Notarial act must be produced in evidence; facts related therein not provable by parole evidence of notary.
Such notarial act inadmissible as evidence where not inserted in schedule of documents, under Rule of Court No. 132.

Aug. 8. Melck *vs.* Albertus.

On the trial in this case, the plaintiff called François Henry Staedel, who stated:—I am a notary public, residing in Cape Town. By direction of Mr. Van der Riet, who is the general agent of plaintiff, I went to defendant in my notarial capacity to put a certain question to defendant respecting the four bills due by B. Phillips to plaintiff. I made a notarial act in my protocol the very same day of this question, and the answer which was returned to it. On the same day I was asked by Mr. Van der Riet for a certificate of what had passed between me and Mr. Albertus, and I gave him one.

On an objection made by *Cloete*, for the defendant, the Court decided that the parole testimony of Mr. Staedel could not be received in evidence of what he had done in his notarial capacity, and of which he had made a notarial act at the time (the same was found in *Simson & Co. vs. Fleck*, 27*th August*, 1833, *ante*), and that the notarial act could not be looked at by the witness as a memorandum to refresh his memory, and that if produced at all, it must be put in evidence, but that as it had not been inserted in the schedule of documents annexed to plaintiff's declaration, it could now be put in evidence.

Whereupon the defendant was absolved from the instance, with costs. (*Vide Ryneveld vs. Bain, post, p.* 383.)

De Ronde *vs.* Zeyler.

1833. Aug. 31. *Parole evidence is not competent to prove the dishonour of a bill of exchange.*

[Vol. I, p. 61.]

Van der Bergh *vs.* Gie, q.q. Oberholzer.

Mandatary. General Agent.

Insufficient proof of capacity. Summons, service of.

Agreement by A to accept service of summons for B does not constitute A such a general agent of B as to warrant a suit against A as the agent of B.

Dec. 31. Van der Bergh *vs.* Gie, *q.q.* Oberholzer.

In this case, Gie was summoned, as general agent of C. J. Oberholzer, to render in his said capacity payment of a bond due by Oberholzer to the plaintiff.

The Court held that a letter of Gie produced by the plaintiff, which merely stated that, in order to save expense, he would accept service of the summons for Oberholzer, who lived in the district of Worcester, was not sufficient to render him liable in the capacity in which he had been sued; and as the plaintiff did not offer any further evidence to prove Gie's liability, the case was withdrawn with costs. (*Vide Altenstedt vs. Ludwig, 5th December*, 1833.)

Meiring *vs.* De Villiers,

1834. Feb. 1. *Presentment and non-payment of a promissory note are not provable by affidavit in a provisional case.*

[Vol. 1, p. 75.]

Still *vs.* De Wet.

Feb. 18. *Provisional sentence refused, the verity of the signature to the document sued on having been rendered doubtful by parole evidence.*

[Vol. I, p. 93.]

DIETERMAN *vs.* CURLEWIS.

1834. June 30.

Evidence of signature when denied in a provisional case may be given instanter.

[Vol. I, p. 42.]

WATERMEYER *vs.* KERDEL'S TRUSTEES.

Evidence in replication, when inadmissible.

Sept. 4.

Watermeyer *vs.* Kerdel's Trustees.

In this case, the Court held that, after the defendant had closed his evidence, it was not competent for the plaintiff to call as in replication a witness to give evidence which was not in replication, but was really in proof of a part of the issue taken by the plaintiff in his replication, and which, therefore, it was incumbent for him to have adduced in chief, and thus after the defendants had adduced their proof, and closed their case, to call evidence to prove that which it was material for him, and which, therefore, he ought to have proved in chief, and at this stage of the proceedings to give evidence affirmative of the issue which the plaintiff had taken, and which, although it might be contradictory of, was not in replication to the evidence which had been adduced by the defendants.

RYNEVELD *vs.* BAIN.

Notarial instrument, how far evidence per se of the facts stated in it.

Dec. 18.

Ryneveld *vs.* Bain.

At the trial of this case, an action for literal injury in the Circuit Court of Graaff-Reinet, the plaintiff put in a notarial insinuation which stated *in gremio* that it had been served on the defendant.

Stoll, for the defendant, objected that this was not legal evidence of service on the defendant, which must be proved *aliunde*.

Cloete, contra, maintained that this being a notarial deed, was evidence of the facts stated in it; that in practice other evidence had never been required by the former Court of Justice, nor had any question on the point been hitherto raised in the Supreme Court. The Court overruled the objection, subject to the opinion of the Supreme Court.

1834. Dec. 18. — Ryneveld vs Bain.

This day, the Court, after hearing *Cloete* for the plaintiff, and *Brand* for the defendant, found that it was not necessary to lead evidence to prove that an instrument, *ex facie* a notarial act, had actually been executed by the notary by whom it professed to have been executed. And that notarial deeds were evidence *per se* of the facts therein set forth, to the extent laid down by *Voet*, xxii, 4, sec. 5 (*Vide Melck vs. Albertus, ante, p.* 381.)

RYNEVELD *vs.* BAIN.

Evidence of Record.

Record of Circuit Court, correctness of, cannot be questioned incidentally in Supreme Court, but amendment may be prayed on motion, supported by sufficient affidavits.

Dec. 18. — Ryneveld vs. Bain.

This case, which was an action for damages for a alleged libel in the Circuit Court of Graaff-Reinet, h after the evidence was closed, been removed to the Supre Court.

This day *Brand*, for the defendant, was proceeding to state and comment upon certain circumstances connected with the examination of one of the plaintiff's witnesses in the Circuit Court, which he contended raised two objections to the admissibility of his evidence, which he stated had been made in the Circuit Court, and erroneously overruled.

But the Court held that as neither these circumstances nor the fact of the objections having been taken and overruled appeared from the record, the Court could not notice or decide on any matter which did not appear on the record as it stood before them. And that if the defendant averred that the record was imperfect, the proper course was for him, on sufficient affidavits, to move to have the record amended by the insertion of the matter alleged to have been improperly omitted, after which it would be competent for the Court to notice and decide upon the effect of all the facts and circumstances on the record.

Brand stated he was not prepared with such affidavits.

WIDOW OF NIEUWENHUIZEN *vs.* NIEUWENHUIZEN.

Charter of Justice (2nd), § 44. 132nd Rule of Court, old and new. Evidence in Circuit Court.

The rule requiring documents put in proof by the plaintiff to be scheduled to the declaration now extends to the Circuit as well as to the Supreme Court.

1835. Jan. 3.

Widow of Nieuwenhuizen *vs.* Nieuwenhuizen.

In this case, after the pleadings had been closed in the Supreme Court, in which the action had been commenced, the case was removed for trial to the Circuit Court for Beaufort.

At the trial, the plaintiff tendered in evidence the will of her deceased husband to prove her title to sue.

The will had not been inserted in the schedule annexed to the declaration.

Cloete, for the defendant, objected on this ground to the will being admitted in evidence in respect to the 132nd Rule of Court.

Kinnear, for the plaintiff, maintained that the 132nd Rule did not apply to trials in the Circuit Courts.

The Circuit Court allowed the will to be put in, but reserved the point for the consideration of the Supreme Court after the removal of the case back to that Court, and gave judgment for the plaintiff.

This day, *Cloete*, for the plaintiff, moved that the judgment should be set aside, in respect that the Circuit Court had admitted evidence which was inadmissible.

The Court held that the 132nd Rule did not apply to the Circuit Courts, and that in virtue of the 44th clause of the Charter, a case, after it was removed from the Supreme Court for trial in the Circuit Court, must be tried according to the same rules as if it had been originally commenced in the Circuit Court, and, therefore, overruled the objection, and affirmed the judgment, with costs.

The Court thereafter, amended the 132nd Rule.

A. *vs.* B.

The record, or an office copy of it, is evidence of a judgment of the Court. A copy of it need not be served with the summons.

Jan. 3.

A. *vs.* B.

In this case the Court declared that they would in future adhere to the following rule:

1835. Jan 2. A. vs. B.

In all cases where it may be necessary to prove any judgment of the Supreme or Circuit Courts, the record, or an office copy thereof, must be produced at the trial; but it shall not be necessary to serve a copy of the same with the summons in any case.

NEDERLAND'S EXECUTORS *vs.* GNADE.

Feb. 2. *Notice to pay up a bond provable by parole evidence or affidavit.*

[Vol. I, p. 18.]

BERGH, N. O., *vs.* KRIGE AND BOSMAN.

Feb. 10. *Parole evidence of the defence non numeratæ pecuniæ allowed to a provisional claim on a bond.*

[Vol. I, p. 89.]

WYLDE *vs.* WYLDE.

July 6. *A wife's admission in her plea of having committed adultery is not sufficient evidence per se of the adultery.*

[Vol. I, p. 269.]

WEYERS *vs.* STOPFORTH.

Nov. 30. *The unsupported evidence of the woman with whom the adultery was alleged to have been committed held insufficient per se to prove the adultery.*

[Vol. I, p. 273.]

ROESCH, EXECUTOR OF ROESCH, *vs.* WHITE.

An affidavit by a notary of the service by him of a notice on the defendant to attend at the Registrar's office and receive transfer, inadmissible evidence. A notarial act is required.

1836. Aug. 31.

Roesch, Executor of Roesch vs. White.

In this, which was an undefended case, the plaintiff tendered an affidavit by Long, a notary public, as evidence that he had served a notice on defendant to attend at the office of the Registrar of Deeds on a certain day to receive transfer.

The Court rejected it as inadmissible, in respect that it was not the notarial act of a notary, but an affidavit of a person who was a notary.

ANDERSON *vs.* HUTTON AND WOEST.

Parole evidence not admissible to prove notice of dishonour in a provisional case.

1837. Aug. 1.

[Vol. I, p. 75.]

LE ROEX *vs.* VAN WYK.

Where a declaration alleges a ground of action for a divorce before the 1st day of December or thereabout, evidence may be led as to what occurred during the whole of the month of December.

1839 May 2.

[Vol. I, p. 253.]

BROEKMAN, EXECUTRIX OF DURR, *vs.* RENS.

Where in answer to an action for re-delivery of a transfer deed there was no special plea of læsio enormis, evidence cannot be led to show that the price stipulated by the contract of sale was less than one half of the real value of the property, or to claim that the sale shall be set aside on that ground.

June 1.

[Vol. II, Part 2, p. 15.]

THE QUEEN *vs.* CLOETE.

When a party has been bound over to keep the peace for a certain time, and within that time commits and is convicted of an assault, the record of such conviction is sufficient evidence of the assault in an action by the Crown to estreat the recognizance.

1839. Aug. 13.

The Queen *vs.* Cloete.

Cloete had been ordered to enter, and had entered, into a recognizance to keep the peace for six months to A. B. and all other Her Majesty's subjects in the sum of £100.

Thereafter, Cloete, within the said period of six months, was convicted of an assault and a breach of the peace.

In respect of this conviction, the *Attorney-General*, on the part of the Crown, instituted an action against Cloete before the Circuit Court of Stellenbosch to have the recognizance declared forfeited, and to recover the amount.

The plaintiff, in the Circuit Court, put in the recognizance, which was admitted by defendant, also the criminal record-book of the District of Stellenbosch, which was admitted by the defendant, and contained the record of the conviction of Adriaan Philippus Cloete, for seizing by the throat and offering to strike Abraham Faure, of Stellenbosch, on or about the 16th day of April, 1839, before the Resident Magistrate of Stellenbosch on the 13th May, 1839.

Defendant admitted that he was the person so convicted.

Plaintiff closed his case.

Defendant maintained that the record of the conviction was not the best, and, therefore, not admissible evidence that the defendant had actually committed a breach of the peace; and quoted *Phillips on Evidence, vol.* 1, c. 2 § 3, *p.* 318, 3.

The Court removed the case to the Supreme Court, and this day the case came on for argument.

The *Attorney-General* maintained that the record of the conviction was both admissible and sufficient evidence that the defendant had committed the breach of the peace, in respect of which the present action was brought; and that by his having committed this breach of the peace, he committed a breach of the conditions, and had *eo ipso* forfeited the recognizance, and quoted *Blackstone*, 4, 252.

Cloete, contra, argued that the only object and effect of the recognizance was to protect the particular individual named in it, and that the words "and others Her Majesty's subjects" were only words of style, and had no effect; consequently, that the recognizance could only be forfeited by a breach of the peace committed on the particular individual

named in the recognizance. Secondly, that the Court had the power, and ought to modify the penal sum in the recognizance, according as the particular circumstances under which the breach of the peace founded on aggravated or mitigated it, and therefore it was necessary for the Court to have the breach of the peace proved by evidence, in order that they might have knowledge of the particular circumstances of the case, and consequently that the record of the conviction was not *per se* sufficient evidence in this case, and quoted *Phillips*, 1, *c.* 2, § 3, *p.* 3, *p.* 318, 319.

1839. Aug. 13. — The Queen *vs.* Cloete.

The Court, concurring in the argument of the *Attorney-General*, gave judgment for plaintiff for £100, and costs.

O'Connell *vs.* Stander.

A plaintiff-merchant's books, verified by his oath, held per se insufficient to prove a balance of account in an action by default without adminicular evidence.

1841. Aug. 5. „ 31. — O'Connell *vs.* Stander.

In this case, in the Circuit Court of George, held in April, 1841, plaintiff proposed to prove his claim for an alleged balance due by defendant on an account for merchandise sold and delivered by plaintiff to defendant, merely by the production of his own books, verified by his own oath, without any other evidence in corroboration. The Circuit Judge (Menzies, J.) removed the case to the Supreme Court, in order to have the sufficiency of this kind of evidence decided; but allowed the plaintiff in the meantime *de bene esse* to produce his books and give his oath as to their correctness. The plaintiff produced his waste-book and ledger (the only books kept by him), and swore to the correctness of that part of the waste-book which had been kept by himself, and to his belief of the correctness of that part which had been kept by his clerk, who was now dead, and that defendant's account in the ledger was correctly made out from the waste-book.

This day, the plaintiff's case was argued by the *Attorney-General*, who, in support of the admissibility and sufficiency of the plaintiff's oath in supplement of the entries made by the plaintiff himself, quoted *Ordinance No.* 72, § 27; *Van der Linden, p.* 257; *Voet* 22, 4, § 12 *and* 13; *Censura Forensis, p.* 2, *l.* 1, *c.* 29. And in support of the admissibility and sufficiency of plaintiff's oath in supplement of the entries in the books made by his deceased clerk, quoted *Phillips on Evidence, edit.* 1838, *p.* 337, and produced the records of several cases tried on circuit by the Chief Justice,

in which plaintiff's oath had been admitted in supplement of the books, *when confirmed by certain circumstances of evidence* (none of which circumstances, nor any equivalent thereto, existed in this case).

Cur. adv. vult.

Postea (31st August).—The Court unanimously held that the plaintiff's books, verified by his oath, were *per se* insufficient evidence to prove his case, and absolved the defendant from the instance.

Defendant did not appear either on Circuit or in the Supreme Court.

STILL *vs.* NORTON.

Extra-judicial affidavit by a deceased notary rejected.

1841. Nov. 29. 1842. Feb. 28. Still *vs.* Norton.

On the trial of this case, plaintiff proposed to put in evidence an affidavit dated the 5th January, 1839, made by John Anderson, in order that the statements therein contained as to certain facts alleged to have been within his knowledge should be received as evidence of those facts, to prove which they were prevented from producing Anderson himself, in consequence of his death.

Defendant admitted that Anderson was dead, that he had been the notary employed by the parties to prepare the deed of dissolution of partnership between them, and to have been present at a certain meeting which a preceding witness, Benjamin Norden, swore had taken place between the parties, and at a part of which he, Norden, was present; that Anderson had been subpœnaed by the plaintiff, and had attended at the trial of the case (28th November, 1838), when the order of reference was made which had given rise to the present proceedings, and was not then examined in consequence of the decision of the Court that parole evidence was inadmissible to qualify the terms of a certain deed of release. The plaintiff's object in putting this affidavit in evidence was to contradict certain statements made by the witness Norden as to what had taken place at said meeting, and as to a balance-sheet which he swore he had then seen, but the existence of which was denied by the plaintiff.

The *Attorney-General*, for the defendant, objected to the admissibility of this affidavit as evidence.

Musgrave and *Ebden*, for plaintiff, quoted *Ordinance No.* 72, § 44; *Starkie on Evidence*, *vol.* 1, *p.* 38, *and seq.* 61, 107, 301; *Gresley's Law of Equity Evidence*, *p.* 131, 174

179; *Chitty's Equity Practice, vol.* 2, *p.* 1,008; and maintained that the declaration of a person as to facts which were peculiarly within his notice, and who had no interest to misrepresent the truth, is admissible to be proved, when, from death or otherwise, the person himself cannot be produced, and that the exclusion of the evidence would be a very great hardship on the plaintiff.

1841. Nov. 29. 1842. Feb. 28. Still *vs.* Norton.

The Court, without calling on the *Attorney-General*, held that the affidavit was not secondary evidence which may be admitted in absence of better evidence, but was not evidence at all. The law considers a statement made by a person on an oath sworn by him voluntarily and extra-judicially as no better than a simple statement not made on oath. The affidavit, if admitted, could therefore only be evidence that Anderson had extra-judicially made certain statements, that is to say, mere hearsay evidence of what Anderson had said extra-judicially. That, as the evidence tendered did not fall within any of the excepted cases in which hearsay evidence is admissible, it must therefore be rejected. (*Vide Starkie, vol.* 1, *p.* 200.)

Postea (28th February, 1842).—The plaintiff, whose costs defendant had been adjudged to pay, moved the Court to review the taxation of his costs by the Master in so far as the Master had refused to allow him the expenses incurred in procuring the attendance of the said Anderson as a witness at the trial of the case on the 28th November, 1838.

The Court refused the application, on the ground that the evidence which Anderson had been summoned to give was not admissible at the trial of the issue then depending between the parties.

Van Blerk *vs.* Naude.

Where a decree for the restitution of conjugal rights had been obtained, and thereafter a dissolution of the marriage on the ground of malicious desertion was prayed, copy of the previous judgment was considered sufficient proof of the marriage.

1842. Nov. 30.

[Vol. I, p. 257.]

WILSON, APPELLANT *vs.* ECHARDT, RESPONDENT.

Debauchment, action for.

A married man, when entitled to make oath of non-paternity in such action.

1842. Nov. 17.

Wilson, Appellant, *vs.* Echardt, Respondent.

This was an application to review and reverse a sentence given by the Resident Magistrate of Cape Town, in an action brought by respondent against appellant, for £20 damages, and expenses occasioned by appellant, her sister's husband, having debauched respondent and made her pregnant of a female child, of which she had since been delivered.

Both parties had tendered their oaths, and the Magistrate had refused to take the appellant's oath, and admitted the respondent to give her oath; when she swore positively that the appellant was the father of the child, and that no other person had ever had connection with her.

Brown, a witness, swore that when the respondent was first discovered to be pregnant, she had named another brother-in-law, Smuts, as the father of the child.

In her deposition, respondent explained this by saying that she had told her sister, appellant's wife, that appellant was the father of her child, and that she had advised her to name Smuts.

Musgrave, for appellant, quoted *Van der Linden, Inst.*, 251; *Van Leeuwen, Rom. Dutch*, 482; and *Voet*, 48, 5, *section* 6, to show that the appellant's oath ought to have been taken.

Cloete, contra, maintained that the Magistrate took one oath, and refused the other under the discretionary power given him by the 23rd Rule; and quoted *Grotius, Book V, p.* 35, *and notes.*

The Court held that the fact that the respondent had first named Smuts as the father of the child was an *indicium ingens* sufficient to entitle the appellant to have his oath taken, although a married man, and therefore reversed the judgment, and remitted to the Resident Magistrate to take the oath of the appellant, and such other further evidence as either of the parties may produce. Costs to abide the issue.

PHILLIPS & KING *vs.* CHIAPPINI & CO.

Partnership, proof of dissolution of: insertion of notice of dissolution in the Gazette is prima facie evidence of its insertion by the firm of which the dissolution is so notified.

1842. Aug. 15.

Phillips & King vs. Chiappini & Company.

This was an action to annul a contract for the sale and purchase of fourteen chests of indigo, on the ground that plaintiffs were induced, by false and deceitful representations, to purchase the article at a price far beyond its fair and marketable value. Damages were laid at £520.

In the course of the proceedings, it became necessary to prove a dissolution of partnership.

Ebden tendered the *Government Gazette* of the 7th April last, containing an advertisement announcing the dissolution of partnership between plaintiffs and Mr. Jenkins;—and argued, first, that the *Gazette* was good evidence that it contained an advertisement inserted in it; and secondly, that the insertion of this advertisement of the dissolution of partnership was *prima facie* evidence that it had been inserted by plaintiffs.

The *Attorney-General* admitted the first position; but argued against the second, unless there was other evidence to connect plaintiff with it.

The Court were unanimously of opinion that the advertisement in the *Gazette* was *primâ facie* evidence against plaintiff of the facts stated in it, unless rebutted; and therefore admitted it.

TRUSTEES OF RANDALL *vs.* HAUPT.

Affidavit held incompetent to prove indorser's waiver of due negotiation.

1844. July 12.

[Vol. I, p. 79.]

COSTS.

WITHAM *vs.* VENABLES.

28.
ch 14. *Security for costs not exigible from a plaintiff who is an incola (inhabitant), nor from one who, although no incola, has immovable property in the Colony.*

[Vol. I, p. 291.]

DUNLEVIE *vs.* HARRINGTON AND ANOTHER.

March 18. *Security for costs not exigible from the plaintiff, a military man in service in the Colony, he being, quoad hoc, an incola.*

[Vol. I, p. 292.]

IN RE INSOLVENT ESTATE BUSISSINNE.

Government liable to pay costs of suit.

Sept. 3. [Vol. I, p. 318.]

MYBURGH *vs.* COMMISSIONER FOR SEQUESTRATION

Trustee when personally liable for costs improperly in

1829.
Jan. 7.
1831.
Dec. 14. [Vol. I, p. 345.]

HEARTLEY *vs.* POUPART, ATTORNEY OF M

Sept. 24. *Costs of attorney for proceeding in the name man not allowed where death known to hi*

[Vol. I, p. 400.]

PRINCE, Q.Q. DIELEMAN, *vs.* BERRANGE.

1836.
June 24.
Sept. 1.

Guardians entering into litigation concerning the property of minors without the authority of the Court personally liable for costs, and cannot recover from minors if unsuccessful.

[Vol. I, p. 435.]

CLOETE *vs.* VON MANGER AND OTHERS.

Costs of the day allowed where plaintiff was not prepared with certain proof, and asked for time.

1832.
Dec. 4.

Cloete vs. Von Manger and Others.

In this case, the plaintiff sued defendants as being the heirs of a certain deceased person.

Cloete, for plaintiff, produced the will, by which the defendants were appointed the heirs of that person.

Brand, for defendants, denied that the defendants had ever assumed the character of or acted as heirs, and therefore were improperly sued, and quoted *Voet* 29, 2, 7.

Cloete asked and obtained a term (fourteen days) to prove that the defendants had assumed the character of heirs.

Brand moved for the costs of the day.

After a full discussion of the principle, the Court unanimously awarded the costs of the day to defendants.

VAN DER LIET *vs.* EXECUTORS OF KARNSPECK.

Costs. Signing judgment by default. Costs of former instance to be first paid, before proceeding in the same cause.

1832.
Dec. 11.

Van der Liet vs Executors of Karnspeck.

The Court held that a plaintiff against whom the defendants had obtained judgment to be signed, for his default in not proceeding with the action, could not make application to be allowed to institute a new action until he had paid the defendants their costs in the former action. (*Deneys vs. Stoffberg, p.* 301, *vol.* 1.)

In Re Holyoke *vs.* Laing.

Costs. Security for, not exigible from plaintiff within the jurisdiction, and no allegation made as to his intended departure from it.

1833. June 27.

In Re Holyoke *vs.* Laing.

The *Attorney-General*, on the part of the defendant, moved that the plaintiff, as not having a domicile in this Colony, should find security for costs, and quoted *Van der Linden, p.* 412.

Cloete opposed the motion on the ground that, by the provisions of the Charter, the plaintiff, being within this Colony, was under the jurisdiction of the Court, and the authority in question did not apply, there being no allegation that the plaintiff was about to leave the Colony.

Motion refused with costs.

Simson & Co. *vs.* Fleck.

Aug. 31.

Plaintiff having withdrawn a provisional sentence cannot proceed anew until the costs of the former summons have been paid. An offer of such costs into Court on the day of second summons is not sufficient.

It is a bad tender of costs to write "take notice that we have withdrawn the summons issued in the above case, &c., and your costs thereon, when made up and taxed, will be paid by us on demand."

[Vol. II, Part 2 (continued), p. 255.]

Brink *vs.* Gough.

1834. Feb. 1.

Where a promissory note is not made payable at any specified place, and summons was issued against the drawer, without previous presentment, held that if defendant on being so summoned, at once tendered the sum to plaintiff or attorney, he will not be liable for costs of summons. But such a tender to the Sheriff's officer is bad, if not authorized by the plaintiff.

[Vol. II, Part 2 (continued), p. 256.]

DE WET *vs.* MEYER.

Provisional sentence refused on an attorney's bill of costs where it did not appear that the same had been taxed in the presence of the party, or after due notice given him to attend the taxation. 1834. Feb. 28.

[Vol. I, p. 59.]

THOMAS *vs.* BARKER.

Attorney's lien for costs.

An attorney employed by an executor to recover a debt due to the testator has a preference on the amount of the judgment in the Sheriff's hands for his costs of this action, but not for his account against the executor for other business done not in connection with the testator's estate. Sept. 12.

[Vol. I, p. 321.]

DENEYS *vs.* DANIEL.

Provisional sentence. Denial of signature. Costs.

Costs double, granted against a defendant who first denied and afterwards, on proof threatened, admitted his signature.

1835. Feb. 10.

Deneys *vs.* Daniel.

On the 3rd of February, 1835, the defendant had denied his signature to the note on which provisional sentence was claimed, and his counsel was instructed to deny that he could write, and plaintiff was allowed a day to prove the signature.

This day, plaintiff proposed to call as a witness a person who had seen the defendant affix his signature, whereupon defendant's counsel stated that he admitted the signature.

Thereupon *Cloete*, for the plaintiff, moved that, in respect of defendant's groundless and false denial of his signature, the Court should award against the defendant something more than the mere costs, and quoted *Voet* 22, *tit.* 4, § 11, and *Van Merula Man. Proc.* 4, 37, 2, 4.

The *Attorney-General* failed to state any circumstances to show that the defendant's denial proceeded either from ignorance or mistake.

WYLDE, C.J., was not satisfied that the authorities applied; but MENZIES and KEKEWICH, J.J., held that

…10. … vs. …del.

the authorities quoted applied, and that the law as lai down in them was now in force, and were of opinion th the defendant should be subjected to double costs.

Provisional sentence granted, with double costs.

REDELINGHUYS *vs.* THEUNISSEN.

May 1. *Where service was not made until four months after date of a promissory note specifying no place of p ment, if the defendant tender payment of the note on presentment to be made to him thereof, such tender will save him from the costs of the summons, but not when he only makes such tender in Court on day of hearing.*

[Vol. II, Part 2 (continued), p. 258.]

WICHT *vs.* FAURE.

May 19. *The debtor of a promissory note, payable to A. B. or order, is not liable to the costs of a notice served on him by an indorser, the holder of the note.*

[Vol. II, Part 2 (continued), p. 259.]

MASTER OF THE SUPREME COURT, Q.Q. ORPHAN CHAMBER, *vs.* CATS.

Costs. Interest.

tigants residing in different districts, plaintiff entitled bring action in Supreme Court, and, if successful, get Supreme Court costs.

Quære: Whether interest can be accumulated with cap in ascertaining whether action is or is not competen be brought in Resident Magistrate's Court.

May 26. Master of the Supreme Court, q. q. Orphan Chamber, vs. Cats.

In this case, the plaintiff, of Cape Town, brough action in the Supreme Court against the defenda resident in the town of Stellenbosch, for the su £9 17s. 4d., "which he owes as and for the balanc upon and by virtue of a certain mortgage bond, &c together with the interest due upon the said sum 17s. 4d. from the 1st of July, 1833."

(N.B.—This interest amounted to more than £1.)

1835. May 26.

Master of the Supreme Court q.q. Orphan Chamber, *vs.* Cats.

The Court gave judgment for the plaintiff.

The defendant objected that the plaintiff was only entitled o claim such costs as he would have got in the Court of he Resident Magistrate, in which he ought to have brought is action, the sum sued for being under £10, the plaintiff ot being entitled to add the interest to the principal to aise the value of the action above £10.

The plaintiff answered that he was entitled to accumulate he interest with the capital, in ascertaining whether the ction was or was not competent to be tried in the Court of he Resident Magistrate.

2ndly,—That there was neither any absolute rule nor eneral principle, that a plaintiff suing in the Supreme ourt for a sum for which he might have sued in the esident Magistrate's Court, and recovering judgment in he Supreme Court, should be disallowed any part of the osts to which he would otherwise have been entitled, nerely because he had sued in the Supreme Court, rather han in the Resident Magistrate's Court; and that the particular circumstances under which the Master, as epresenting the Orphan Chamber, was placed, in suing lebtors in cases like the present, showed that he was not cting vexatiously in suing in the Supreme Court, instead of the Resident Magistrate's Court, and therefore ought to be allowed his full costs.

The Court gave no judgment on the point as to the accumulation of the interest with the capital; but gave judgment for the plaintiff for full costs, being of opinion that he had not in this case acted vexatiously in suing in the Supreme Court.

[By Act 20 of 1856, Sect. 34.]

ANDERSON *vs.* MEYER AND MAYNARD.

Rules of Court 27, 132.

A plaintiff refused to consent to allow defendant to avail himself of certain documents at the trial. Thereupon the defendant called upon plaintiff by notice to allow him so to avail himself. Plaintiff did not oppose, and the Court granted the motion, but refused defendant his costs of the application.

1836. Aug. 9.

Anderson *vs.* Meyer and Maynard.

In this case, Maynard, one of the defendants, wished to be allowed to avail himself at the trial of the evidence of two documents which had been omitted to be inserted in his schedule.

1836. Aug. 9.

Anderson vs. Meyer and Maynard.

The *Attorney-General* produced an affidavit, proving that defendant's attorney had tendered to plaintiff's attorney, for signature, a paper consenting to permit the defendant to avail himself of the documents as required by him, upon which plaintiff's attorney replied, "No, I cannot consent to it."

And that thereafter a notice was served on plaintiff's attorney, "that the Supreme Court will be moved on Tuesday next, &c., at which time you are required to show cause, if any, why the defendant Maynard shall not be allowed to avail himself at the trial of the cause of the documents in question," and moved in terms of the above notice.

No opposition was made by the plaintiff to the motion, which was granted.

Thereafter the *Attorney-General* moved for the costs of the motion, and referred to the case of *Reis vs. Zeederberg and Others*, 26*th August*, 1834, in which, on granting a similar application, the Court had allowed costs.

But the Court, notwithstanding the order as to costs in the case referred to, which they considered to have been made in respect of the particular circumstances attending that application, and the opposition which had been made to it, and on considering the 27th and 132nd rules, held that the refusal of the plaintiff to consent to that which the Court, on the defendant's motion, unopposed by plaintiff, had now allowed to be done, did not necessarily render the plaintiff liable to the costs of the application,—that there was no sufficient cause shown why in this particular case the plaintiff ought to be adjudged to pay such costs; and therefore refused the defendant's application for the said costs, leaving them costs in the cause.

Anderson *vs.* Meyer and Others.

Aug. 11. *Husband and wife being married out of community, and the wife's estate having been, after her death, surrendered as insolvent, the husband, inter alia, claimed for an amount of costs which he had paid in an action instituted against his wife and relating to her separate property. The Court held that this was a loss during the marriage which was to be borne only by the husband, under the provisions of the antenuptial contract.*

[Vol. I, p. 294.]

VAN DER BERG *vs.* DE LIMA.

A decree of civil imprisonment refused, where the costs of a former unsuccessful application for civil imprisonment had not been paid.

1837. Feb. 7.

[Vol. III, Part 2, p. 150.]

DE LIMA *vs.* VAN DER BERG.

Insolvency. Rehabilitation. Costs.

An insolvent, successful in obtaining his rehabilitation, notwithstanding opposition of creditors, not necessarily entitled to costs of such opposition.

Nov. 28.

De Lima vs. Van der Berg.

In this case, in which the insolvent's application for rehabilitation had been opposed by Van der Berg, one of his creditors, by reason of objection thereto, founded both on law and on fact, but which had been granted by the Court after evidence had been taken, and the insolvent had been examined on oath.

The *Attorney-General*, for the insolvent, this day moved for costs, which was opposed by Van der Berg.

The Court held that, under the circumstances of the case, the insolvent, although he had succeeded in obtaining his rehabilitation, ought not to have the costs incurred in consequence of the opposition of Van der Berg thereto, and refused the motion, and ordered the applicant to pay the costs of opposing the motion.

Under circumstances nearly, but not quite so unfavourable to the insolvent, the Court (BURTON, J., *dissentiente*) refused the insolvent his costs in the case of *De Beer* vs. *his Creditors, 7th September*, 1830.

KOTZE *vs.* KOTZE'S TRUSTEES.

Costs given against trustees, de bonis propriis, for refusal to make transfer under a will.

1838. Feb. 22. Aug. 9.

[Vol. II, Part 4, p. 414.]

1838. June 6. *Costs to be paid before again proceeding in the same case, provided they have been taxed and demanded.*

[Vol. I, p. 301.]

REIS *vs.* MULLER.

Costs. Witness. Taxation, review of. Deputy Sheriff.

Full costs of service of subpœna by a Deputy Sheriff out of the Colony or beyond his district disallowed. Costs of procuring attendance of witness residing out of Colony.

Sed quære, if the witness, though resident beyond the boundary, had been served within the Colony; or if, being resident beyond the boundary, notice had been given to him in an inexpensive manner.

1839. Feb. 26. Reis *vs.* Muller.

The plaintiff in this case had been condemned in the costs of suit.

On taxation, the Master allowed the following item:—"Paid Sheriff of Uitenhage for service of subpœna on A. B., a witness, beyond the boundaries of the Colony, £34 12*s.*"

Cloete, for plaintiff, moved to have the taxation reversed on the ground that this item had been improperly allowed.

It was admitted that A. B. had been a material witness, that he had attended and given evidence at the trial at Uitenhage, and that his expenses had been allowed on taxation without objection.

The facts of the case were, that the defendant, on ascertaining that the witness was beyond the boundary, had, with the concurrence of the Deputy Sheriff of Uitenhage, put the subpœna into the hands of a friend of defendant's, who had, with horses provided by the defendant, proceeded [illegible] boundary of the Colony to where the witness then [illegible] the subpœna to the witness or had

But they gave no decision as to whether, if after the tness had returned within the Colony and while on his ıy to Uitenhage he had been served with the subpœna by . officer of the Sheriff within the district of that officer, e expense of such service would not have been allowed. or whether the defendant would not have been entitled to arge a reasonable sum for conveying, in the least exnsive manner, notice to the witness while beyond the undary that his attendance at the trial at Uitenhage was aterial, and was requested.

1839. Feb. 26. Reis vs. Muller.

ORLANDINI *vs.* POPE.

Feb. 26. " 28.

Where maker of promissory note, no place of payment specified, by first post after receipt of summons caused a tender to be made, held sufficient to free from costs.

Costs not prayed for on the day of order made may be afterwards prayed for, but no costs given for such second application.

[Vol. II, Part 2 (continued), p. 260.]

NORDEN, TRUSTEE OF BENINGFIELD, *vs.* BRINK, EXECUTOR OF JAECKELS.

Executor. Costs. De bonis propriis.

J.'s trustee recovered judgment against J.'s executor for £150, *the amount of an undue preference and costs. J.'s executor surrendered J.'s estate without satisfying the judgment. B.'s trustee thereupon sued J.'s executor for payment of the judgment and costs de bonis propriis on the ground of his unfounded defence to the action. And so the Court decreed.*

1841. Aug. 3. Norden, Trustee of Beningfield, vs. Brink, Ex. of Jaeckels.

This was an action of debt, upon a former judgment of ıe Court. From the declaration it appeared that Mr. eningfield had, a short time previously to his estate being laced under sequestration, paid to Mr. Andries Brink, in is capacity as executor dative of one Carel Jaeckels, eceased, a sum of £150, which was due to him in that ıpacity; and Mr. Benjamin Norden, being subsequently ppointed trustee in Beningfield's estate, had brought an

1841. Aug. 3.

Norden, Trustee of Beningfield, vs. Brink, Ex. of Jaeckels.

action against Mr. Brink for the recovery of that sum, alleging the payment of it by Beningfield to be fraudulent, and invalid under the Ordinance in force in this Colony concerning insolvents. In that action judgment had been given in Mr. Norden's favour, with costs, but the amount not having yet been paid, and there appearing to be no assets in Jaeckels's estate, of which the sum could be levied, Mr. Norden, as Beningfield's trustee, now brought this action against Mr. Brink personally, for payment of the £150, with interest from the day on which it was illegally paid by Beningfield, and £25 11*s.* 3*d.* costs in the former action, either out of any assets he might hold of Jaeckels's estate, or otherwise out of his private estate.

The defendant denied all and everything set forth in the declaration, and joined issue thereon.

The *Attorney-General*, who appeared for the plaintiff, put in as evidence the record in the former action, with the proceedings under the surrender of Jaeckels's estate, and called

Edward Thompson.—I am trustee in Jaeckels's estate. It was surrendered on the 30th November, 1840. The deficiency on the estate, as per schedule, was £330 8*s.* 8½*d.* The debts amounted to £609 4*s.* 1*d.* Mr. Brink held a preferent bond for £375 on the estate. There was £98 2*s.* in cash, and the outstanding debts were £180 3*s.* 4½*d.* The £98 2*s.* appears as the balance of the £150 received from Beningfield. Among the proceedings is an account of Mr. Brink's disbursements as made before the surrender. Mr. Brink handed to me vouchers for some of the items. These vouchers are among the pleadings.

After putting in the bill of costs sued for, the plaintiff closed his case.

The defendant produced no evidence.

The *Attorney-General* argued, first, in support of plaintiff's claim to the costs, that the costs arose from the fault of the defendant himself in setting up and maintaining an unfounded defence in the action in which decree for those costs were given. (*Tidd's Practice, Ed.* 1828, *p.* 337.) Secondly, he argued in support of the claim for the repayment of the £150 from the private funds of the defendant, and quoted *William* 2 *on Executors*, 1260, to show that the defendant must be liable to repay the £150, although before the judgment of Court, in the former case of *Norden* vs. *Brink*, he *plene et recte* had administered, and *bonâ fide* paid away to the creditors of Jaeckels the whole of the £150 received by him from Beningfield. Thirdly, that, at all events, Mr. Brink must repay so much of the £150 as was in his hands at the time the former judgment was given;

1841. Aug. 3. Nordeu, Trustee of Beningfield, vs. Brink, Ex. of Jaeckels.

and that the whole sum must be held to have been in his hands at that time, except in so far as it has or can be shown that he had *bonâ fide* paid the money away in the administration of and on the behalf of Jaeckels's estate; and that there is no proof that any part of this sum was so disposed of except £11 12*s.* 1*d.* retained by Truter and Meeser, through whom the £150 was paid by Beningfield to defendant, on account of their costs incurred in consequence of the legal proceedings instituted by them as defendant's attorneys, against Beningfield and his surety, Mr. Wright.

Cloete, for defendant, maintained that an executor was in the situation of a mandatory, and quoted *Voet*, 17, 1, 9, to show that a mandatory never renders himself personally liable except when he has expressly contracted in his own name. On this point he also quoted *Cens. For.*, 1 *B.*, *Ch.* 17, § 13; 2 *Part*, 1 *B.*, 33, § 37.

The Court gave judgment for plaintiff, £138 7*s.* 11*d.*, as the balance due on the £150 claimed, with interest thereon *a tempore moræ*, that is, from the 12th June, 1841; and £25 11*s.* 3*d.*, being the costs of the former action, amounting in all to £163 19*s.* 2*d.*; and the costs of this present action.

Stoll *vs.* Brandt.

1842. Feb. 1.

The Sheriff on making a personal arrest must, if security is offered, take it, not merely for the amount of debt and costs mentioned in the writ, but also for £35 or £40 to cover further costs.

[Vol. I, p. 126.]

Hablutzel *vs.* Hablutzel.

Nov. 8.

Costs given against the guilty wife in an action for divorce by reason of her adultery.

Semble, if the defendant was entitled to no estate either separate or as her share of the community, her attorney would be entitled to have his costs, incurred before the decree, out of the common estate.

[Vol. I, p. 276.]

ROSCHER *vs.* MELCK.

Tender, costs of, when discretionary with Court.

1842. Nov. 29. — Roscher vs. Melck.

This was an action brought by plaintiff to recover £300 damages for an injury committed by defendant against plaintiff, in consequence of the defendant having gelded or caused to be gelded a certain bull, the property of the plaintiff.

In his plea, the defendant pleaded,—1st. A general denial of all the allegations in the declaration. 2nd. That during the years 1839, 1840, and 1841, the said bull, which was of a bad breed, owing to the negligence of the plaintiff trespassed for several months on the lands of the defendant so as to mix with his herds of valuable breeding cattle, and to cause them to produce calves of a worthless breed and out of the proper season, and that, nothwithstanding repeated applications made by defendant, plaintiff took no steps to prevent this; that the bull was of little value, but was so fierce and dangerous to approach that it could not be driven away without great risk and danger to the person in charge of defendant's cattle; wherefore the defendant caused the bull to be castrated; and, further, that after the issuing of the summons, the defendant tendered to plaintiff £10 as ample compensation for the alleged damage, together with all the costs incurred by plaintiff up to the date of the tender, but the plaintiff refused to accept the same, which defendant is still willing and ready to pay.

Plaintiff, in his replication, admitted the tender.

After hearing much evidence on both sides, the Court gave judgment for plaintiff. Damages £10, being the amount tendered (Nov. 15—MENZIES, J., absent on Circuit), leaving it to the parties afterwards to move the Court on the question of costs.

This day, on the question of costs and in support of defendant's claim not only to be freed from the costs incurred by plaintiff after the tender, but also to have the costs incurred by him, defendant, subsequent to his tende *Cloete* quoted *Van der Linden, Inst.* 416; *Voet*, 5, 1, § 7 *ad finem.*

The *Attorney-General, contra,* quoted *Van der Linden*, 41 *Voet*, 46, 3, 28, 29.

The Court (all the Judges present) held that the q tion of costs was in their discretion, and, under the cumstances, adjudged that the defendant should pay p tiff's costs incurred before the plea was filed, and plaintiff should pay defendant's costs incurred after th

De Smidt *vs.* Blanckenberg.

Costs of two Counsel allowed.

1843.
Aug. 3.
„ 17.

[Vol. II, Part 2 (continued), p. 249.]

Van den Burg, assisted by her Trustee, *vs.* Gebhard.

Magistrate's Judgment. Costs.

A magistrate's judgment as to costs equally subject to review as his judgment on the merits.

Feb. 16.

Van den Burg, assisted by her Trustee, vs. Gebhard.

This was an application for review of a sentence given by the Resident Magistrate of Cape Town in an action brought by plaintiff against defendant, on the ground that it was contrary to law, in so far as, while it gave judgment for plaintiff for £6, it adjudged him to pay his own and defendant's costs. The words of the judgment were: "Judgment for plaintiff, £6. Costs against plaintiff, £9 9*s.* 6*d.*"

After argument by counsel, sentence as to costs reversed. Defendant adjudged to pay plaintiff £1 10*s.* as costs in the Magistrate's Court, and the costs of this review.

The Court held that, although it is in the discretion of the Resident Magistrate to give or refuse costs, this is a judicial discretion, and that the judgment given by the magistrate as to costs was equally subject to review as his judgment on the merits of the case, and that, where a judgment as to costs was brought under review, the Court of Review must exercise their own judicial discretion as to whether it should be confirmed or altered, and to obtain the materials sufficiently to exercise that discretion from the record of the pleadings and evidence, more especially when the magistrate had not judicially assigned the reasons for his judgment.

They were of opinion that the judgment of the magistrate as to costs was so ambiguous as to be unintelligible.

Birkwood *vs.* Van Rooyen.

Provisional sentence on a promissory note where the signature had been previously denied and the plaintiff had then failed to prove the same, but refused for the costs to which the defendant was put by said denial.

Feb. 22.

[Vol. I, p. 50.]

JOHNSTONE *vs.* KOTZE.

Where an accepted acknowledgment is made payable on presentation the Sheriff's service of a summons for the amount is not such presentment, and where a defendant had under these circumstances tendered the amount of the note without costs, the Court upheld his right so to do.

[Vol. II, Part 2 (continued), p. 284.]

BEUKES *vs.* VAN WYK.

Dec. 12. *Where a note was made payable at a particular place "in the month of October," and notarial protest was made on the 22nd November, such protest held unnecessary, and cost thereof disallowed.*

Where a note is made payable at a particular place on a particular day, and is presented on behalf of the creditor at that place and not paid, the creditor is entitled to the costs of such presentment, although the notary have to travel a far distance to make it; but not if the note be duly paid.

[Vol. II, Part 2 (continued), p. 282.]

STEYTLER *vs.* DE VILLIERS.

1846. June 13. *Where the holder of a note not made payable at a particular place summoned the defendant without presentment, the Court awarded costs to defendant; but, holding that defendant immediately on service should have tendered the amount on condition of the note being presented which he had not done until the day of hearing, gave plaintiff the costs of the day.*

[Vol. II, Part 2 (continued), p. 286.]

DICKSON *vs.* GELDENHUYS.

Provisional sentence refused in favour of an attorney against his client, the plaintiff in a previous action, on a taxed bill for the costs in that action, which the defendant therein had been condemned, but had failed to pay. Separate notice to his own client to attend at the taxation is necessary.

1846. July 13

[Vol. I, p. 60.]

NORDEN *vs.* OPPENHEIM.

Appeal to Privy Council.

Supreme Court Charter, § 50.

Costs cannot be taken into consideration in estimating appealable amount.

Aug. 1.

Norden vs. Oppenheim.

The plaintiff this day applied for leave to appeal against the judgment given by this Court on the 13th July last, in the cause then depending between him and the defendant, whereby the defendant had been absolved from the instance with costs,—on the ground that as the summons in that cause claimed £500 *and costs*, the cause was appealable as being above the value of £500.

But the Court held that the claim for costs could not be taken into consideration in estimating the value of the suit between the parties; and that the 50th section of the Charter only gave the right of appeal when the value of the matter in dispute was above £500; and refused the application.

ELSTER *vs.* JENNINGS.

Costs, bill of.

Where an appeal coming before the Circuit Court was withdrawn on an undertaking by the appellant to pay the "legal expenses" of the opposite party, held that such legal expenses were represented by the taxed bill of costs, and did not include items ultra.

1847. May 18.

Elster vs. Jennings.

This was an application, at the instance of Elster, to review and set aside the judgment given by the Resident Magistrate of Port Elizabeth in an action in which the

1847. May 18.

Elster vs. Jennings.

respondent was plaintiff and appellant defendant,—on the ground that the same was unjust, and unsupported by and contrary to the evidence.

The respondent had been the attorney of Hart & Canstatt in an action between them and the appellant, which was to have been tried in the Circuit Court of Port Elizabeth. This case was settled and withdrawn, the appellant undertaking to pay all the legal expenses incurred by plaintiff. The respondent brought his bill of costs before the Registrar of the Circuit Court, by whom it was taxed as between attorney and client, at £17 16*s.* 9*d.*, as certified by the Registrar at the foot of the bill.

After the bill had been taxed and signed by the Registrar, the respondent wrote on the the blank fly leaf of the bill:

Very many attendances on you and my client. One attendance for four hours previous to the suit	£2	2	0
Ceding the bond, and very many attendances on your friends since action brought	1	1	0
	£3	3	0
Taxed costs in suit	17	6	9
	£20	9	9

And demanded from the appellant this sum of £20 9*s.* 9*d.* Appellant offered to pay the £17 6*s.* 9*d.*, but refused to pay the additional £3 3*s.*, alleging that the taxed costs were the plaintiff's legal expenses. Respondent received the former sum under reservation of his claim for £3 3*s.*, for which he brought an action in the Court of the Resident Magistrate of Port Elizabeth "as for the work and labour, care and diligence, of the said John Jennings, performed as an attorney during the months of September and October, 1846, in a certain cause in which Hart & Canstatt were the plaintiffs and the said Guslav Elster the defendant."

The plaintiff called Alexander Tennant, who stated that he had been employed by the defendant to endeavour to settle the above action, which he had done, and promised on the part of defendant to defray all legal expenses incurred by Mr. Canstatt during his stay in Port Elizabeth.

Cross-examined: The plaintiff in this case (the respondent) called on me frequently, and I also on him.

And also D. H. Canstatt, who stated: I settled an action brought by Hart & Canstatt against the defendant with Mr. Tennant, as his agent. There was a paper drawn

1847. May 18.

Elster vs. Jennings.

vhich Mr. H. Kay was a witness. In that agree- was stipulated that the plaintiff's legal expenses e paid by defendant. From the trouble the plain- : in this case, I think the charge of £3 3s. very ıle. I don't know where that paper is.—And put ıxed bill of costs.

Resident Magistrate gave judgment for the plaintiff, ta.

Court reversed this judgment, on the ground that 3s. claimed, not having been inserted in the bill of ich respondent had procured to be taxed as between and client, could not now be considered as part of Canstatt's legal expenses.

ZEDERBERG *vs.* NORDEN.

otice to pay up. Costs of giving the stipulated notice ay up a bond must be paid by the creditor and not by debtor on a bond.

1848. March 13.

Zederberg vs. Norden.

is case the plaintiff sued the defendant for payment tgage bond which contained the usual clause, that endant "shall be allowed and also be obliged to ayment of, three months subsequent to legal notice been given or received to that effect."

ıe 6th December, 1847, the plaintiff had caused his r to serve a notice on the defendant, requiring him the bond three months after the date of service. ee months having expired on the 6th March, and nt not having made payment, a letter was written plaintiff's attorney to him, calling his attention to piration of the period of notice. Thereafter, but sly to the 10th March, the defendant tendered to the 's attorney the full amount of the capital and due, but this the attorney refused to receive, unless ndant also paid him the following costs:

	s.	d.
tructions to call in capital	3	4
awing notice and fair copy to serve ...	2	6
py and service thereof	3	0
awing affidavit of service	3	10
tending to be sworn	3	4
ls of costs, copy, &c.	2	6
	18	6

1848
March 13.

Zederberg vs. Norden.

The defendant refused to pay these costs, whereupon the plaintiff took out the present summons.

The only point at issue between the parties was whether defendant was bound to have paid those costs.

The Court (WYLDE, C.J., absent on Circuit) held he was not, because a creditor who takes a note or bond payable on demand or after a certain specified notice is bound to make that demand or give that notice before he is entitled to enforce payment, and must therefore pay the expense of making the demand or giving the notice, being a condition precedent which he has undertaken to perform.

It was stated that, both by the practice of the former Court of Justice, and of the Master of the Supreme Court, in taxing bills of costs, as well where judgment had been given against the defendants as where the defendants had paid the debt only after the summons had been served on them, costs of this nature had invariably been allowed against the defendants; and to prove this, a long series of bills so taxed by the Master were produced.

The Court held that this course of taxation by the Master could not be considered as establishing a rule to that effect, the point never having been brought under the consideration of the Court. And both the Judges stated that in the Circuit Courts it was their invariable practice to disallow such costs. MENZIES, J., stated, however, that he had on Circuit, where the plaintiff had caused such notice to be given by a notary,—where the proceedings of the defendant have rendered it necessary for the plaintiff at the trial to prove that such notice had been given, and where for that purpose he has produced the notarial instrument,—allowed the expense of that instrument, or so much thereof as did not exceed the amount of the costs which would have been incurred in bringing a witness at the trial to prove the notice.

MENZIES' REPORTS.

[NEW SERIES.]

1828-1849.

VOL. III. PART IV.

HAWKINS *vs.* BREDA.

Judax cotterraneus et suspectus.

Self-declinature of one of the judges on account of interest in the case.

In consequence of there being thus no qourum under the old Charter (1828), *case postponed.*

An application to remove case in consequence to Circuit Court of Stellenbosch, refused.

Subsequently, a new Charter (1833) *making two judges a quorum, case proceeded with and decided.*

1832. Dec. 20. 1834 Aug. 15. — Hawkins vs. Breda.

When this case was called (20th December, 1832), MENZIES, J., stated that he had an interest in the decision of the case in favour of the plaintiff, inasmuch as his estate of Sans Souci was contiguous to the plaintiff's place, the Vineyard, and situated below it on the river; that if the case was decided in favour of the defendant, his said estate would be deprived of the water of the river Liesbeek; that the interest was not of any great value, but of such value that he would not extra-judicially have consented that the defendant should exercise the right of damming up the river claimed by him, without a compensation. That in these circumstances it appeared to him that he was liable to be declined as *suspectus judex.* (*Voet*, 5, 1, 45, 46.)

1832. Dec. 20. 1834. Aug. 15. — Hawkins vs. Breda.

The defendant did not propose to waive the declinature, and therefore, as without MENZIES, J., a quorum of the Court could not be formed, the case was postponed.

The Court this day refused to remove this case to the Circuit Court of Stellenbosch, the removal being opposed by the defendant, and the plaintiff alleging no other ground for it, except that in respect of the declinature of MENZIES, J., by the defendant, a quorum of the Supreme Court could not be at present obtained to try this case.

Postea (15th August, 1834).—The case was tried under the second Charter by the Chief Justice and Justice KEKEWICH, when the Court held that the evidence in the case had not proved the allegations of the declaration as to defendant having occasioned the injury in the *locus in quo*, and refrained from expressing any opinion on the points of law which had been raised. Defendant absolved from the instance, with costs.

LEZAR, Q.Q., HOETS, *vs.* VAN OUDTSHOORN.

Notice to pay up a debt given verbally at debtor's residence to the tutor of his family not sufficient.

Secus if written notice had been left with tutor.

1833. Feb 1. — Lezar, q.q. Hoets, vs. Van Oudtshoorn.

The Court held that a notice to pay up a debt was not sufficiently proved to have been given to the debtor by an affidavit of a messenger, that having repaired to the debtor's house for that purpose, and not finding the debtor at home, he had then and there given verbal notice to the tutor of the debtor's family, residing in his house, that the debtor was required to pay up the debt, unless this notice was proved to have been afterwards communicated to the debtor.

Contra, if a written notice had been left by the messenger with the tutor.

ORPHAN CHAMBER *vs.* ASPELING.

Auction, sale by public. Liability of auctioneer, as agent to principal, when and how ceases.

Feb. 27. — Orphan Chamber vs. Aspeling.

The declaration in this case set forth that the defendant in his capacity as the plaintiff's agent at Tulbagh, in the month of May, 1822, held a public sale of the estate of the

late Albertus Meyburgh, and surviving widow, M. M Smith, at which sale W. A. Hanekom became purchaser to an amount of £11 5*s.* 9*d.* That defendant accepted the vendue bills for said amount as cash, and which was to go in part payment of the paternal hereditary portion, which said Hanekom, as husband of E. M. Meyburgh, one of the heirs of the said late A. Meyburgh, had to claim of that estate. That in closing the account of said estate of the late A. Meyburgh, it appeared that the amount of the aforesaid vendue bill exceeded by £11 5*s.* 9*d.* the amount which said Hanekom had to claim out of the aforesaid estate, and for which over issue defendant, under his instructions, remains responsible to plaintiffs, as administering said estate.

In his plea, the defendant admitted the truth of all the matters of fact in the said declaration contained, but pleaded that he is not liable to pay to the said plaintiffs the sum of £11 5*s.* 9*d.*, inasmuch as the said plaintiffs might and ought to have closed the account of the estate of the late A. Meyburgh on or before the end of the year 1824. Whereas the said plaintiffs did not close the said estate until some time in the year 1830, and did not give this defendant notice that the vendue bill in the said declaration mentioned was not paid until the 24th December, 1830. That on or about the 8th April, 1829, the said Hanekom became insolvent and surrendered his estate, and under the liquidation there were no assets sufficient to satisfy his preferent creditors, and the said plaintiffs did not then or at any other time save as aforesaid give the said defendant notice that the amount of the said vendue bill or any other sum was due and owing by the said Hanekom to the estate of the said A. Meyburgh. And that if the said plaintiffs had closed the said estate at the time they ought to have done as aforesaid, the said plaintiffs could and would have recovered the whole amount of the said vendue bill.

At the trial, the plaintiffs produced the *Gazette* of 25th January, 1823, containing a notice by the Orphan Chamber, dated 22rd December, 1823, for the information of those concerned, that the estate of A. Meyburgh and his surviving widow had been finally settled by the Chamber prior to ultimo December, 1822.

It was proved that there had been a further liquidation account of the said estate closed in 1830, in consequence of a small sum of Rds. 30 having been received by the Orphan Chamber and distributed among the heirs; also that the balance due by the defendant on account of this estate, after allowing for the vendue notes taken over, was paid in by him to plaintiffs on the 19th December, 1822. And

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Orphan Chamber vs. Aspeling.

that the vendue note of Hanekom, which had been taken over provisionally by the Chamber from the defendant, had remained in possession of the Chamber from the day when it was so handed over till the trial, without ever having been re-delivered to defendant.

Brand, for the plaintiffs, maintained that the notice contained in the *Gazette*, that Meyburgh's estate had been finally settled by the Chamber, was a sufficient notice to defendant to make it his duty to ascertain the state of inheritance awarded to the heirs, to whom he had given credit, and to take the necessary steps for recovering the amount by which their vendue notes exceeded the amounts due to them out of the estate.

The Court, without calling on *Porter, A. G.*, to answer, gave judgment for defendant, with costs.

The Court held that the Orphan Chamber, having taken this vendue note of Hanekom as cash *provisionally*, that is, until it should be seen whether, when the estate of the deceased was finally liquidated, at the proper time, by the Chamber, the amount of the inheritance due to Hanekom out of the estate did or did not exceed the amount of that vendue note, were bound, so soon as it was ascertained that, after allowing to Hanekom the amount of his inheritance, he was indebted to the estate of the deceased in the amount of this vendue note, either to have immediately demanded payment from Hanekom of that note, and on his failure to do so, to call on the defendant for payment, re-delivering to him the vendue note, or at once to have informed the defendant of the fact that the amount of Hanekom's inheritance was short of the amount due by him to the estate, and to have then re-delivered to him the said vendue note in order that he might recover the amount. That although the responsibility of defendant was created by his instructions, and consequently that its extent must be ascertained from them, it was nowhere laid down in those instructions how such responsibility should be discharged, and therefore that whether it had or had not been discharged, in consequence of the conduct of the plaintiffs, was a question which must be decided by the principles of the common law, according to which the conduct of plaintiffs was sufficient to discharge defendant.

This judgment decided a number of other similar cases between the plaintiffs and the defendant, and others who had been agents for the plaintiffs.

ORPHAN CHAMBER *vs.* STRYDOM.

Supreme Court. Jurisdiction.

Provisional sentence, superannuated.

Supreme Court has jurisdiction to revive superannuated provisional sentence of Circuit Court. (So held by majority of Court: WYLDE, C.J., *dis.)*

1833. Aug. 13.

Orphan Chamber vs. Strydom.

The summons in this case prayed for payment of a sum which the defendant was alleged to be indebted to the plaintiffs, by virtue of the sentence of the Circuit Court of Uitenhage, dated 25th October, 1831, and to plead to the provisional claim, and at the same time to show cause, if any, why the said sentence, which had become superannuated, should not be revived.

WYLDE, C.J., was of opinion that this Court had no jurisdiction to revive the superannuated sentences of the Circuit Courts.

MENZIES and KEKEWICH, JJ., were of opinion that this Court had such jurisdiction, and judgment of revival was given as prayed, with costs.

LIESCHING, EXECUTOR OF FICHAT, *vs.* THE COLONIAL GOVERNMENT.

Government ground, action of damage by grantee for erroneous grant of.

Tender.

F. and the Government bargained for all the waste land belonging to Government lying between certain properties, without reference to any extent, quantity, or boundaries. F. actually got all the Government land so situated, but received a quitrent grant specifying, and a diagram annexed thereto showing, an extent of land greater by 10½ morgen than the Government had power to grant or than F. had actually received. F. brought an action of damages. HELD, *that having bargained for and actually received the ground as above, he had no claim for damages, but only for a proportionate repetition of the quitrent he had paid.*

Tender by defendant of £5, without costs, held insufficient.

1833. Aug. 22.

Liesching, Executor of Fichat, vs The Colonial Government.

The following were the facts admitted by the parties, or proved on the trial of this case:

On the 20th September, 1814, the Governor granted on perpetual quitrent to Charles Blair, a piece of land of 46 morgen and 115 square roods in extent, and situated as described in the diagram thereof.

Fichat was the proprietor of the place called Veldhuyzen, between which and Blair's ground there was interposed some waste land, the property of the Government.

Mr. Stoll, who had been landdrost of the Cape district, proved that, in 1822, Fichat claimed a right of shutting up a road leading through his said place Veldhuyzen, to Wynberg, and that he was then informed by the landdrost that, whenever the public complained of the interruption, he would take legal proceedings to have the road reopened. After this the Governor wished to widen and change the direction of this road, and desired the landdrost to try and make an arrangement with Fichat to consent to this, and to give the ground necessary for widening this road off his place Veldhuyzen, in exchange for a grant of the Government waste land adjoining Veldhuyzen, and between it and the ground of Blair and Dreyer.

That he (the landdrost) did so, and described to Fichat that the grant he should receive would be of the Government waste land lying between Veldhuyzen and Mr. Blair's and Dreyer's, whatever the extent of it might be, and that no particular quantity or extent was mentioned.

That Fichat consented to this arrangement, that the bargain was parole, and that at this time, no diagram of the land proposed to be granted to Fichat had been made, nor were the boundaries of this waste land, that he was to receive under this bargain, pointed out to Fichat. No commission of inspection had been made of the waste land to be so granted, because the general survey of the district had been so recently made by Thibault. The grant to Mr. Blair had been made after Thibault's survey, and consequently the land granted to him was not marked on Thibault's plan.

The road through Veldhuyzen was widened and altered as proposed, and a grant was on the 23rd January, 1824, made to Fichat of the said waste land on the following terms:—

"I hereby grant on perpetual quitrent unto James Fichat, Esq., a piece of land of twenty-eight and a half morgen, situated, &c., &c., extending north and west to the place Veldhuyzen, east to the place Stellenberg and the land of F. Dashwood, Esq., as will further appear by the diagram hereunto annexed."

The quitrent was only two rixdollars, equal to three shillings sterling.

Mr. Dashwood was the proprietor of Mr. Blair's place when Thibault's survey was made, after acquiring which Mr. Blair had obtained the grant containing the ten and a half morgen in question.

The land-surveyor employed to make out the diagram of Fichat's grant, being ignorant of Blair's grant, took the quantity of waste ground belonging to Government to be granted to Fichat from Thibault's plan, and thus erroneously included in it 10 morgen and 184 square roods of the land which had previously been granted to Blair. This mistake was not discovered at the time.

On the 19th August, 1825, the plaintiff, as executor of Fichat, then deceased, sold the place Veldhuyzen, together with the said quitrent land as contained in the grant of 23rd June, 1824, to Schonnberg for a sum of £2,000, who, after taking possession, discovered that 10 morgen and 184 square roods of the land contained in the latter had previously been granted to, and consequently belonged to, Blair.

Schonnberg brought an action against the plaintiff for damages for the loss sustained by him in not obtaining said 10 morgen and 184 square roods, of which action plaintiff caused due notice to be given to the defendant in the present action (the Secretary to Government, in his official capacity) to join with or to intervene in lieu of the plaintiff in the said case, which the defendant refused to do.

In this action, Schonnberg recovered back out of the price £75 as damages from the present plaintiff, with costs, which, together with his own costs, amounted to £50 more, and the plaintiff now brought this action to recover from Government these two sums of £75 and £50.

The defendant denied his liability for any damages, because he denied that by the grant of 23rd June, 1824, the Government had legally conveyed and transferred to Fichat the 10 morgen and 184 square roods in question; and farther pleaded that even if it should be held that the land had been legally granted to Fichat, such grant had been made in error, and that the plaintiff was not entitled to demand from the defendant on that account any greater amount than he can prove was received by Government from him on account of said land, or at most than Fichat's estate was damnified by such error.

The plaintiff replied that the land in question had been granted by Government in exchange for the ground given by Fichat for the new road, and that Fichat's estate had been damnified thereby to the amount sued for.

1833. Aug. 22.

Liecching, Executor of Fichat, vs. The Colonial Government.

The defendant rejoined that the Government had a clear right and title to make a road through any part of the place Veldhuyzen, and that the land granted in the grant of 23rd June, 1824, had been granted without any consideration, or under an erroneous impression that the Government had not a right to make a road through Veldhuyzen, and that long before the said grant was made, the said road was a public road, and tendered and paid into Court the sum of £5, leaving it to the plaintiff to take so much thereof as he shall see fit as damages by him sustained by reason of the premises.

At the trial, the original grant of the freehold place Veldhuyzen, dated 1718, was produced, containing a clause "that the said grant was made subject to all such servitudes and regulations as had then been made, or should be made in future, for the good of the public."

After hearing the Counsel for the parties, the Court held that as the bargain between Fichat and Government had only been *for all the waste land belonging to Government* lying between certain properties, without reference to any extent or quantity, or to any boundaries, and as Fichat had actually got all the Government waste land so situated, and which belonged to Government when the bargain was made, he had no claim against Government in consequence of the quitrent grant specifying, and the diagram thereunto annexed showing, an extent of land greater by 10½ morgen than the Government had the power to grant or than the plaintiff had actually received. But that as the quitrent specified in the grant must be held to have been calculated and fixed with reference to the twenty-eight morgen specified in said grant, and not to eighteen morgen, which was all that was actually conveyed by it, and as the plaintiff had paid one full year's quitrent, he was entitled to repetition of such part of such rent as corresponded to the difference between twenty-eight morgen and eighteen, which they estimated at one shilling, and that the plaintiff was entitled to costs.

The Court held that the tender made by defendant in the rejoinder was not sufficient to deprive the plaintiff of the costs incurred by him subsequently to the tender, because the previous costs had not been tendered.

The Court expressed no opinion on any of the other questions which had been raised.

Judgment for plaintiff. Damages one shilling and cost

EKSTEEN *vs.* HAYWARD AND HIGGINSON.

Rules of Court, 18, 25, 26.

Where a deceased plaintiff was barred by the Rules of Court from declaring, his representatives seeking to proceed with the action are also so barred.

1834. June 10.

Eksteen vs. Hayward & Higginson.

Cloete, for Eksteen, stated that this action had been commenced by the son of his client, who died in the first week of February last, that his client was the legal heir of his son, and he therefore moved that his client should be entered on record as plaintiff, in the room of his deceased son, the original plaintiff.

The *Attorney-General* opposed this motion on the ground that as no declaration had been filed within the February term, the plaintiff was by the 18th Rule absolutely debarred from declaring, and consequently that no action now subsisted to which the applicant could be admitted as plaintiff. (*Vide also Rules* 25 *and* 26.)

It was not denied that if the original plaintiff had lived, he would now be debarred from declaring, in consequence of not having filed his declaration in February term.

Under these circumstances, the Court refused the application, with costs.

BURD *vs.* TOWNSEND.

Condition as to time, when of the essence of a contract.

B. was master of a vessel which, trading to China, called in at Table Bay. T. resided in Cape Town. They made a joint adventure of certain goods to be sold by B. in China. B. being obliged to leave China for Europe, left the goods for disposal by the purser of his vessel, in China. On his way to Europe he called in at Table Bay, payed the estimated moiety of the adventure, with interest to date, to T., who entered into a written obligation to repay the amount of loss, if any, which might have arisen upon the sale of the goods, provided such loss should be made clearly to appear by the production at Cape Town of proper accounts and vouchers, within twelve months from the date of such written obligation; and provided also that such loss had not been occasioned by any neglect or mismanagement of the said B. It afterwards appeared that T.'s

loss on the adventure was £30, *and it was proved that this loss had not been occasioned by any such neglect or mismanagement. But the account showing the loss was not produced to defendant until twenty days after the expiration of the twelve months fixed by the obligation. On this ground T. resisted the repayment.* HELD, *that time having been of the essence of the contract, T. was not liable.*

1834. Sept. 3. — Burd vs. Townsend.

In this case the plaintiff and defendant admitted the following facts:—

On the 1st February, 1831, the plaintiff and defendant entered into an agreement, whereby the plaintiff, then being the commander of ship *Norden*, bound from this port to China, agreed to take charge of a certain investment of plated goods consigned to him by the defendant, under certain provisions and stipulations contained in the following receipt granted by plaintiff to defendant:—

"Cape Town, February 11, 1831.

"Received of Mr. J. Townsend an investment of plated goods consigned to me, amounting, as per invoice, to 2,556 rixdollars; the one half I purchase by acceptance of Mr. P. M. Brink at nine months after date; the whole to be sold on account of Mr. J. Townsend and myself, with equal shares of profit, and the account to be closed on my return to the Cape of Good Hope by payment of the proceeds, or in case of not returning to the Cape, to be remitted previous to returning to Europe.

"JOHN BURD."

The plaintiff, after his arrival at China, left the ship *Norden* for the purpose of proceeding to Europe before he had been able to dispose of the whole of the said investment, which he left in charge of the purser of the *Norden* for the purpose of being disposed of for the joint account of himself and the defendant.

On his voyage from China to Europe, the plaintiff touched at this port in March, 1833, when, being unable to render account-sales of the said goods to the defendant, he (the plaintiff), in terms of the receipt, upon the 28th of March, 1833, paid to the defendant the moiety of the invoice price of the said investment, with the interest thereon from the date of the shipment, amounting together to the sum of £102 10*s.* 3¾*d.*, upon which the defendant executed the following obligation, that is to say:—

"Whereas Captain J. Burd, &c., &c., did, on the 1st February, 1831, receive from Mr. J. Townsend, of Cape Town, a certain investment of plated goods, for which he gave the following receipt in writing, whereof the following is a copy" (here the terms of the receipt were set forth); 'and whereas the said Captain Burd hath now returned to this Colony, but is unable to render proper account-sales of the said goods, or any part thereof, or to return the same; wherefore the said J. Townsend hath called upon him, the said J. Burd, for payment of one moiety of the amount of said invoice, being 1,278 rixdollars, together with interest thereon from the 2nd February, 1832, which payment the said J. Burd hath agreed to make to the said J. Townsend, upon receiving his undertaking in writing to pay one moiety of any loss which may have arisen upon the sale of the said goods, *provided the same shall be made clearly to appear by production at Cape Town of proper accounts and vouchers within twelve months from the date hereof*, the said John Burd giving his undertaking in writing to pay the said John Townsend one moiety of any profit which may have accrued on the sale of the said goods, over and above the said sum of 1,278 rixdollars as aforesaid. Now, therefore, I, the said J. Townsend, do hereby engage and bind myself, my heirs, executors, and administrators, to pay to the said J. Burd, his heirs, executors, administrators, or assigns, one moiety or half part of whatever loss may arise upon the joint speculation hereinbefore mentioned, *provided proper account-sales and vouchers be produced to me within twelve months from the date hereof, and provided also that such loss has not been occasioned by any neglect or mismanagement of the said John Burd.* In witness," &c., &c.

When the account-sales of the said goods were rendered, it appeared from them that there was a loss on the one moiety belonging to the defendant amounting to the sum of £23 7*s.* 11*d.* (which, with the sum of £6 13*s.* 3¾*d.* previously paid as interest to the defendant by plaintiff, amounted to the sum of £30 1*s.* 2¾*d.*), which loss was not occasioned by any neglect or mismanagement on the part of the plaintiff. These account-sales had been produced to the defendant, but not until twenty days after the expiration of the time stipulated in the aforesaid obligation, viz., twelve months after the date thereof. Under these circumstances, the plaintiff maintained that as the defendant did not allege and could not prove that he had sustained any injury by the said delay of twenty days, it was against equity and good conscience on the part of the defendant not to pay the plaintiff the said sum of £30 1*s.* 2¾*d.*

1834. Sept. 3. — Burd vs Townsend.

The above facts having been all admitted, the Counsel for the parties this day proceeded to argue the point of law, namely, whether the defendant could insist on the lapse of the period of twenty days over and above the stipulated period of the year from the date of the defendant's obligation before the accounts were rendered, as releasing him entirely from his obligation, or only to release him in so far as he could show that he had suffered damages in consequence, and referred to *Fonblanque on Equity, 1st Book, c.* 6, § 4, *and note g: Barnardiston* vs. *Fane Vernon, 2, p.* 366, *c.* 328. *Sugden's Vendors and Purchasers, pages* 138, 345, 348. 12 *Vesey, jun.*, 475.

The Court held that the condition as to the time here was of the essence of the contract, and gave judgment for defendant, with costs.

GERBER, APPELLANT, *vs.* RICHTER, RESPONDENT.

Appeal. Title to sue.

No objection to title of plaintiff can be taken on appeal which has not been taken in the Court below.

Sept. 3. — Gerber, Appellant, vs. Richter, Respondent.

This was an appeal from a sentence of the Resident Magistrate's Court.

The appellant sued as an insolvent, and as "assisted by his trustee," for wages due for work done by him after the surrender of his estate. The respondent had not taken any objection to the appellant's title, and the Court held that he could not do so now, even if there was any objection to his title, as to which they gave no opinion, and affirmed the judgment, with costs.

WATERMEYER *vs.* KERDEL'S TRUSTEES.

Partnership—Anonymous.

Construction of deed.

Non-liability of anonymous partners to third parties.

Sept. 4. Dec. 30. — Watermeyer vs. Kerdel's Trustees.

On the 6th February, 1834, the estate of J. H. Kerdel, who had carried on business as a shopkeeper in Cape Town, ostensibly in his own name, and who had also been engaged in business at Uitenhage, in partnership with one Hendrik

Hitzeroth, and trading under the firm of Kerdel and Hitzeroth, was, on his own petition, placed under sequestration as insolvent, under the provisions of Ordinance No. 64.

Thereafter the defendants, R. W. Eaton and J. C. Chase, were duly elected as the trustees of the said estate.

At the third meeting of the creditors of Kerdel, the plaintiff claimed to prove a debt to the extent of "£1,985 10*s.* 11½*d.* on an account-current for money paid and advanced for the use of the insolvent;" but the Master refused to admit the debt as proved against the estate.

Thereafter Watermeyer, in terms of the provision of the 34th section of the Ordinance No. 64, appealed to the Supreme Court against this decision of the Master.

After hearing the parties, it was ordered by the Court that Watermeyer, as plaintiff, should file a declaration.

The plaintiff, in his declaration, alleged that Kerdel had become indebted to him,—first, by a notarial bond, dated 9th February, 1829, in the sum of Rds. 3,333 2 4, as the price of goods purchased by him from plaintiff, on which a balance of Rds. 2,533 2 4, with interest, was still due to the plaintiff. Secondly, by a notarial bond, dated 4th March, 1831, in the sum of 11,500*f.*, lent and advanced to him by plaintiff. Thirdly, by a notarial bond, dated 4th July, 1831, in a sum of Rds. 1,500, lent and advanced to him by plaintiff. Fourthly, by a notarial bond, dated 15th February, 1833, in a sum of Rds. 5,533 2, lent and advanced to him by the plaintiff. Fifthly, in the sum of £965 10*s.* 11½*d.*, being the balance of an account-current between the plaintiff and Kerdel, dated 15th April, 1834.

That the said sums, amounting in all to £1,985 10*s.* 11½*d.*, were still due to plaintiff, and payment thereof had been demanded from Kerdel before the date of his insolvency, but which Kerdel had neglected or refused to make. Wherefore the plaintiff prayed that the defendants, in their capacity as trustees of Kerdel's estate, may be condemned to pay the same, in as far as the *judicium preferentiæ* and *concurrentiæ* will admit.

In their plea, the defendants denied that the said Kerdel ever became liable to the plaintiff in the several sums, or any part thereof, in which he is alleged by the declaration to have been so indebted, save and except in so far as the said Kerdel was accountable to the plaintiff for the due administration of such sums as he shall be able to show were advanced, in manner hereinafter mentioned, to a partnership concern, carried on under the firm of J. R. Kerdel, in which the plaintiff was one of the partners. The defendants alleged that, on or about the 1st January, 1831,

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the said plaintiff and the said J. R. Kerdel entered into articles of co-partnership, by which it was, *inter alia*, agreed and stipulated between them that the said "agreement with each other is to be of force and to have effect for the period of three years, reckoned from the 1st January, 1831.

"F. G. Watermeyer shall furnish to J. R. Kerdel 20,000 guilders, for which J. R. Kerdel shall be obliged to keep an open shop in Cape Town of no less value at its cost price than 35,000 guilders, which he shall be obliged to increase to 40,000 guilders before he shall be allowed to ask further advances in cash from F. G. Watermeyer.

"Watermeyer shall be obliged to increase the first advance to an amount of 25,000 guilders in the proportion as above mentioned, according as Kerdel shall show him that he has increased his shop to an amount of from 45 to 50,000 guilders, cost price. This further supply must always occur within three months after notice and proof.

"Kerdel shall not be at liberty to increase his shop to a greater amount than 50,000 guilders cost price without the consent of Watermeyer; but Watermeyer shall at all times be obliged to supply in cash the half of the cost price value of the goods in the shop.

"Kerdel shall at all times be obliged to have a stock of goods in his shop, the cost price of which shall amount to one-third more than what Watermeyer has advanced in cash.

"Kerdel shall be obliged to serve the shop, for which he may bring into account the necessary shop assistance, shop and store rent, coolie wages, and other reasonable shop expenses.

"When, at the expiration of the three years, both parties shall resolve to discontinue the contract, Kerdel must take over the remainder of the goods, with a reduction of ten per cent. upon the cost price, and a reduction of sixteen per cent. upon the shelves, counter, and all other implements which belong to the shop.

"Watermeyer shall have the right of discontinuing this contract at all times. He shall, however, in that event, leave the capitals advanced to Kerdel at interest to Kerdel for the period during which this agreement should have existed, upon due security to his satisfaction.

"Kerdel shall further be obliged, for all the capitals already furnished or as yet to be furnished by Watermeyer, to pass notarial bonds in his favour, under general mortgage, without personal security. It is, however, understood that Watermeyer shall enjoy no interest upon these notarial bonds so passed, although this be expressed in the bonds, but shall receive such a share in the profits which shall arise from the shop as shall hereafter be made known.

"Watermeyer shall receive as his share one-third of the clear profits which the shop shall have rendered after deduction of the aforesaid expenses. At the expiration of each year an inventory shall be made by Kerdel, the books of the shop closed, and the profits also ascertained.

"In the taking of the inventory, all the goods there shall be reckoned at the actual cost prices, and the counters, shelves, &c., according to what they have cost.

"The third share of the profits also due to Watermeyer shall, if it be desired, be paid to him within the first three months of the new year.

"In the event of Kerdel retaining the money with the consent of Watermeyer, he shall be obliged, after the expiration of the above mentioned three months, to pay interest for the same.

"Should either of the parties, at the expiration of the three years, choose not to renew, but to discontinue the agreement, he shall then be obliged to give six months' previous notice thereof to the other party.

"In the event, also, of the demise of either of the parties, or in the event of the dissolution of this contract upon the expiration of the time herein stipulated, Watermeyer, or his executors or heirs, shall leave his share in the funds in the hands of Kerdel, his executors or heirs, for one year after the date of either of the before mentioned events, on condition, however, that Kerdel, his executors or heirs, shall give good security for the same, to the satisfaction of Watermeyer, his executors or heirs.

"F. Godf. Watermeyer.
"J. R. Kerdel."

The defendants further alleged that, in pursuance of the said agreement or articles of co-partnership, the business of the co-partnership was carried on by the plaintiff and Kerdel until the month of October, 1833, when the same was dissolved by the mutual consent of both parties. That the sum of Rds. 3,333 2 4, a balance whereof is alleged by the plaintiff to be due to him by Kerdel, was put to the credit of the plaintiff at the commencement of the said co-partnership, and reckoned as an advance by him to the said co-partnership to the amount thereof, and that the other sums in the declaration mentioned and alleged to be due to the plaintiff by Kerdel were advances (if the same were advanced, but which the defendants deny to be true) made by the plaintiff to the said co-partnership, for the purpose of keeping up the stock in the shop of the said co-partnership and meeting the liabilities of the said part-

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nership concern. And that the affairs of the said co-partnership concern have never yet been finally wound up, nor the accounts thereof closed as between the partners thereof, but remain still unsettled. Wherefore the defendants prayed that the claim of the plaintiff be dismissed, with costs.

In his replication, the plaintiff denied all the allegations in the plea, save in so far as any of them agree with the allegations in the declaration, but admitted that on the 1st January, 1831, he had entered into the agreement with Kerdel referred to in the plea, in the terms therein set forth, and that the several sums of Rds. 2,533 2 4, 11,500*f.*, and Rds. 1,500, claimed in the declaration, were advances made by the plaintiff to the said Kerdel, by virtue of and in the terms of the agreement aforesaid. But the defendants alleged that the said agreement was discontinued and cancelled, and ceased to exist from and after the 31st December, 1832, when the plaintiff became entitled to demand and have the repayment of the advances made by him as aforesaid, with the interest thereon at six per cent. from the 1st of January, 1833.

Whereupon the plaintiff joined issue with the defendants.

At the trial, the plaintiff put in the four bonds, dated 9th February, 1829, for Rds. 3,333 2 4; 4th March, 1831, for 11,500*f.*; 4th February, 1831, for Rds. 1,500; and 15th February, 1833, for Rds. 5,533 2. Also the account-current between Kerdel and plaintiff, dated 15th April, 1834, signed by plaintiff, and showing a balance in his favour of £965 10*s.* 11½*d.*; and, in proof of the account-current, put in all the vouchers specified on the debit side of the account, the signatures of which were admitted by the defendants.

It was here agreed that the account-current should be subject to be hereafter examined and debated between the parties, if that should be deemed necessary, and that no further evidence on this point should be produced by either party at this stage of the case.

The plaintiff then put in the articles of agreement referred to in the pleadings, as having been entered into between the parties on the 1st January, 1831, at the foot of which was written—

"Cape Town.

"The above agreement is cancelled by mutual consent on the 31st December, 1832.

"F. G. WATERMEYER.
"J. R. KERDEL."

The plaintiff closed his case.

The defendants called the insolvent, Johannes R. Kerdel, after whose evidence,

Brand, for the plaintiff, quoted *Van der Linden, pp.* 575, 578, and maintained that the partnership between plaintiff and Kerdel was of that sort called partnership *en commendite*, or of that called anonymous partnership, and therefore is liable only to his co-partners, and not to third parties; *Pothier on Société*, 2, 2, § 3, 63; *Van Leeuwen Cens. For.*, 4, 3, § 1; *Cod.* 4, 2, *l.* 15; *Van der Keessel*, 703, 704; and maintained that, consequently, the funds which Watermeyer contributed to the partnership were only liable for a rateable proportion of the loss, which, in a settlement of profit and loss of the partnership between him and Kerdel, made in terms of the expressed condition of the contract, should be ascertained to have been suffered by the partnership; and maintained that plaintiff discontinued the contract on the 31st December, 1832, and that the partnership was then dissolved. That, in order to put an end to the contract, it was not necessary for him to obtain the consent of Kerdel; and that the written acknowledgment of Kerdel was not necessary. That the discontinuance of the contract might take place *de facto* by the act of plaintiff, without any writing, and that it actually was discontinued on the 14th December, 1832; and maintained that the bill of sale of the three invoices showed that before its date the partnership must have been dissolved, because by the terms of the partnership Kerdel was only to give him bonds *without security*, while from this sale-note it was evident that it was made to give him a security for the bill to Borradailes, and accepted by plaintiff. He maintained that it was competent for the partners, in October, 1833, to have agreed that the partnership between them should be held as having been dissolved on 31st December, 1832; and that, as Kerdel would have been bound by such an agreement in settling with Watermeyer, his creditors must also be bound by it. In the rough cash-book, which Kerdel had sworn was kept by him after the 14th December, 1832, there is a line drawn on both sides the book, and under it the words "Nieuwe Winkel," and the next entry is of the date of 17th December.

The *Attorney-General*, for defendants, maintained that the acknowledgment of dissolution did not prove the dissolution to have taken place on the 31st December, 1832; on the contrary, that it was proved by the evidence of Kerdel that it took place in October, 1833, and that his evidence was perfectly worthy of credit. That the agreement was not a partnership *en commendite*, or of the nature of that mentioned in *Van der Keessel*, *p.* 704. Here

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Kerdel, who is the *secundus*, stipulated to contribute not only his labour, but also two-fifths at least of the capital. And, secondly, there is no express stipulation in the contract that the business should be carried on solely in the name of Kerdel.

Postea (30th December, 1834).—The Court gave judgment. WYLDE, C.J., stated that the order of sequestration was only of Kerdel's estate, and not of any partnership property, which could not, therefore, be administered under Kerdel's sequestration as to his personal private estate. Whatever may have been the nature of the partnership, if any existed, between Kerdel and plaintiff, the partnership property must be surrendered, and Kerdel alone could not effect any such surrender. Under the existing order of sequestration, therefore, the private estate only of Kerdel could be administered.

The question as to whether plaintiff was a partner depended on the construction to be put on the articles of agreement. That it was admitted that, if there was a partnership, it was not a general, but only an anonymous one; and, if anonymous, the principle was the non-liability of the anonymous partner to third parties for partnership debts. Yet, if the creditors can exclude the plaintiff's present claim, he would in effect be made liable to third parties, because he would thereby be prevented from taking a part in the distribution of the partnership assets, to which he claims to be entitled, and whereby the creditors would be in part satisfied.

In anonymous partnerships, by the Dutch law, clearly the converse of the English principle of partnership, liability takes effect. (*Vide Montagu on Partnership, pp.* 2, 4, and 6; *Gow on Partnership, pp.* 9, 13, 17, and 19.) By the English decisions, *partition of profits* does not in all cases alone constitute a partnership. (See the case in *Gow*, 17, 19, as to sailors on lay, persons working a lighter, or receiving percentage as a broker.) It is, therefore, uncertain if the agreement would be held on English principles to constitute a contract of partnership between plaintiff and Kerdel. But, if it did constitute an anonymous partnership, what is its principle and result? Little is contained in the Dutch authorities on this kind of partnership, which they class with partnership *en commendite*.

Pothier's explanation on this subject is not supported by any collateral authority. The example given by him of such a partnership is of "*une negotiation*,"—not a *business*. In such a case, *Pothier* lays it down that such a partner is liable indefinitely, but query if beyond the amount brought

into the fund. Such a liability is inconsistent with the basis of non-responsibility to third parties.

In this case, the plaintiff, in fact, makes no claim to the partnership fund; it is left subject to that disposal and application which the law may warrant.

The plaintiff claims as a creditor upon bond securities, not as having any interest in the partnership fund. As an anonymous partner, it was open to the plaintiff to make any terms, which may differ the contract as between the partners, third parties not being affected thereby or interested therein. On considering the terms of the agreement, it will be seen that it stipulated no division of general profits, except as to the interest on loans. The term "share of profits" refers to interest only, and not to capital sums. The plaintiff was to be without any control of the fund as to its use or application. He was to be without the power of interfering with the accounts, credits, purchases, or concerns of the alleged partnership. Kerdel prevented and resisted all interference by plaintiff in taking over goods, &c., during Kerdel's absence. Under the agreement, the plaintiff is made subject to no losses. But if it were competent to the parties, being irresponsible to third persons, to settle any terms of a partnership contract as being anonymous, then plaintiff has in the agreement expressed his non-liability for any partnership loss. If no profits, he could claim no interest on his bonds; if otherwise, one-third only, as the interest for and upon the capitals. Kerdel has paid the interest in part upon plaintiff's loans, and one of the instalments on the first advance.

The plaintiff's right as a creditor subsists on the mortgage bonds given at the time of the money lent. The act of giving such bonds from time to time proves the fact that the plaintiff was not a partner, but lent the capitals to Kerdel, for the purposes of his private business. One of the bonds was given previous to the date of the agreement, and, therefore, before any partnership, and one after the dissolution of it by mutual consent, on 31st December, 1832. The assignation by Kerdel of the invoice to plaintiff for his advance in June, 1833, by his acceptance to Borradailes shows that plaintiff was not then a partner of Kerdel. If Kerdel cannot object to the bonds, as giving proof of a preferent debt upon his estate, his creditors are also barred from objecting. Kerdel could not gainsay the agreement; he had the free use of plaintiff's advances, and has no equitable ground of objection to plaintiff's claim on these bonds. As to the period of the dissolution, Kerdel would be, and therefore the defendants are, bound by his consent to date it back. The date of dissolution will there-

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fore be so far referred back in all its consequences. The objection founded on *anonymous* partnership, therefore, cannot apply but to the bonds given during the existence of the agreement. But if plaintiff is not a partner, the period of the dissolution of the agreement only marks the time when the plaintiff was to have legal interest only, and no part of the profits by way of interest. The agreement was no fraud on creditors; it was no unfair commercial speculation. By the registry of the bonds, the plaintiff was a known creditor of Kerdel, and credit was obtained by, or should have been given to, Kerdel subject to the plaintiff's bond debts. The English principle as to dormant partners, therefore, does not apply, while the Dutch law clearly admits of such qualified partnership responsibility. As, however, plaintiff was no partner, but only a claimant upon bonds given by Kerdel for money advanced under the terms of the agreement, the interest whereof was to depend on the profits, he was of opinion that the plaintiff was entitled to judgment.

KEKEWICH, J., was of the same opinion, on the same grounds.

MENZIES, J., stated that the first question to be decided is, whether any partnership existed between Watermeyer and Kerdel,—because, if not, there can be no ground, after what was proved, admitted, and agreed on by the parties at the trial, for rejecting Watermeyer's claim to prove a debt against Kerdel's estate for the amount of the advances made by him to Kerdel. He held that this agreement between Watermeyer and Kerdel had the legal effect of constituting a partnership between them, and that its terms completely negatived the proposition which has been maintained, namely—that it was merely an agreement stipulating that Watermeyer should advance certain sums to Kerdel on loan, and that, instead of receiving legal interest on the loan, he should receive, as the interest of the money lent, a certain share of the profits, which Kerdel should make of his (Kerdel's) shop. This agreement stipulates —1st. That Watermeyer shall furnish to Kerdel 20,000*f.*, for which Kerdel shall be obliged to keep an open shop in Cape Town, of no less value at its cost price than 35,000*f.*, which he shall be obliged to increase to 40,000*f.*, before he shall be allowed to ask further advances in cash from Watermeyer. 2ndly. That Watermeyer shall be obliged to increase the first advance to an amount of 25,000*f.*, in the proportion above mentioned, according as Kerdel shall show him that he has increased his shop to an amount of from 45,000*f.* to 50,000*f.* cost price. This further supply

(*toelag*—properly, contribution) must always occur within three months after notice and proof. 3rdly. Kerdel shall not be at liberty to increase his shop to a greater amount than 50,000*f.* cost price, without the consent of Watermeyer. But Watermeyer shall at all times be obliged to supply in cash, the half of the cost price of the goods in the shop. That Kerdel shall at all times be obliged to have a stock of goods in his shop, the cost price of which shall amount to one third more than Watermeyer has advanced in cash.

He held that all these were clearly stipulations entered into between the two partners for the purpose of fixing the amount of the capital which they should jointly advance for the partnership concern,—the proportion of the capital which each of the parties was to contribute,—and the circumstances under which each of the partners should be obliged to advance that proportion. That from the very nature and terms of those stipulations, it is not possible that they could ever have been introduced into an agreement having no other object than to regulate the terms of a loan of cash by one of the parties to the other. The terms of the written agreement brings the contract between the parties in this case completely within the definitions given of a contract of co-partnership by *Van der Linden, pp.* 572, 573, and *Voet, B.* 17, *T.* 2, *section* 8, although the replication is so framed that it may be construed as denying the partnership alleged by the defendants to have subsisted between the plaintiff and Kerdel. This point of the case was not insisted on by the plaintiff's counsel at the trial, and his argument was wholly directed to make out that the partnership which did subsist between them was one of such nature as not to bar the plaintiff's claim.

The plaintiff's counsel maintained that the agreement between the parties constituted that partnership known in the laws of Holland under the name of partnership *en commendite*, and that, according to the principles regulating that class of partnerships, he was entitled to prove against the insolvent estate of his co-partner for all the capital which he (Watermeyer) had put into the partnership concern. But on considering the definitions given in the authorities of the law of Holland of partnership *en commendite*, and of that called anonymous partnership, he (MENZ., J.) held that the partnership between the parties was not a partnership *en commendite*, but possessed all the requisites and qualities constituting an anonymous partnership according to the law of Holland. (*Vide Van der Linden's Institutes, pp.* 575, 576; *Pothier on Partnership,*

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cap. 2, *No.* 60, 61; *Van der Keessel, Thes.* 704. The rights and obligations of the parties under it must, therefore, be regulated by the principles applicable to anonymous partnerships, established in the law of Holland, for which *vide Van der Linden's Inst., p.* 578, and *Pothier ut supra, cap.* 2, *No.* 63, *and cap.* 6, *No.* 102, an attentive consideration of which had led him to the conclusion that there is no ground whatever upon which the claim made by the plaintiff in this case can be successfully maintained. For it is to be observed that this is not a case in which creditors who have contracted with the known partner of an anonymous partnership are seeking to make the anonymous partner pay the debts due to them out of his private funds. Here the anonymous partner is seeking to obtain from the estate, which has been surrendered as insolvent by the known partner, the whole amount of the capital which had been advanced by him to the partnership, and which had been actually employed in the business of the concern; which claim of the anonymous partner is resisted by the creditors of the known partner, who, first, as representing Kerdel, maintain, as they allege he himself, if solvent, would have been entitled to maintain, that the amount which the anonymous partner is entitled to claim as a debt from the known partner is not the whole amount of the capital which the former may have advanced, but merely the balance (if any) which remains of that capital, after deducting the amount of the losses and debts of the partnership,—and this balance, they maintain, has not yet been ascertained, because there has as yet been no winding up or settlement of the partnership affairs; and, secondly, who maintain in their own right, as creditors of the partnership, that none of the partners, either anonymous or known, can claim out of the assets of the partnership estate payment of debts due to them individually, either by the partnership or by his co-partner, until all the debts due by the partnership to its creditors are first discharged; and who allege that the estate, which has been surrendered by Kerdel as insolvent, and upon which Watermeyer now claims to prove his debt, includes the whole—nay, for aught that appears to the contrary, may be entirely composed of—assets arising from the funds and effects of the partnership concern.

The truth of the first proposition maintained by the creditors is obvious so soon as the conditions of the agreement between the parties, and the nature and purpose of the advances made by plaintiff, the amount of which the plaintiff now maintains to be a debt due to him, are considered. For it has been shown

that, by the agreement, a partnership was constituted between the parties, and that all the advances made by the plaintiff were for the purpose of furnishing funds wherewith to carry on the business of the partnership. For the sake of illustration, suppose the case that in terms of the first clause of the contract, Kerdel had advanced 15,000*f.* and Watermeyer 20,000*f.*; that upon this joint capital of 35,000*f.* the parties continued to trade for three years, being the period stipulated by the terms of the partnership, and that the parties had then mutually agreed to dissolve it; that, upon winding up the affairs of the concern, it turned out that, in consequence of losses, bad debts, &c., the whole of the capital had been lost,—could Watermeyer, under such circumstances, successfully have sued Kerdel for repayment of the 20,000*f.* which he (Watermeyer) had advanced as his proportion of the capital on which the partnership was to trade? Most undoubtedly not. The repayment of this sum by Kerdel to Watermeyer, in the circumstance supposed, would have the effect of throwing upon Kerdel the whole amount of the losses sustained by the partnership, and have freed Watermeyer from any share of that loss. Kerdel would thus be made to pay 20,000*f.* more than his just share of the loss, although by the law of Holland, in anonymous partnerships, the anonymous partner is bound, in proportion to his share in the partnership, to free the known partner from the losses sustained by the partnership. (*Pothier ut supra, No.* 102.) That in this case Kerdel actually granted a bond to Watermeyer for the 20,000*f.* is a circumstance of no weight. The situation, rights, and liabilities of the parties are not, by the granting of the bond, rendered different from what they would have been if Kerdel, instead of granting the bond, had merely given to Watermeyer an acknowledgment to the following effect:—"I, J. R. Kerdel, acknowledge that G. F. Watermeyer has paid to me 20,000*f.*, as his proportion of the capital to be employed in carrying on a shop in Cape Town in my own name, but for our joint benefit." The bonds given were merely vouchers given to Watermeyer to enable him to prove the amount of the capital advanced by him, and to give him a preference over the private creditors of Kerdel for so much of this capital as he might, at the winding-up of the partnership, be entitled to claim from Kerdel over the private creditors of Kerdel. This view of the case is corroborated by the last clause of the agreement, in which it is stipulated, "that in the event of the demise of either of the parties, or in the event of the dissolution of the contract upon the expiration of the time herein stipulated,

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Watermeyer, or his executors or heirs, shall leave his share in the funds in the hands of Kerdel for one year," and not the amount of the capital which he had advanced.

The second proposition is founded on a general principle regulating the law of partnership,—and as the limitation of the obligations of anonymous partners to creditors is an exception from the general rule, it is not to be extended farther than there is express authority for so doing. And no authority has been produced to show that the creditors of an anonymous partnership are not entitled to have their debts discharged out of the assets of the parnership, no matter by which of the partners they may have been advanced, before the anonymous partner is entitled to claim out of those assets repayment of the capital advanced by him, or payment of debts due to him individually, either by the partnership or by his co-partner.

On the view of the case which has now been taken, the question then comes to be, What is the date at which this winding-up of the partnership affairs is to take place, in order to ascertain the state of those affairs, and for what amount Watermeyer is entitled to claim repayment out of Kerdel's estate of the capital advanced by Watermeyer? This date must be held to be that of the surrender of the estate, if the partnership had not been dissolved previously thereto, or the date of the dissolution, if it was actually dissolved previously thereto.

The plaintiff has maintained that it must be held to have been dissolved as on the 31st December, 1832; the defendants, as on or about the 10th of October, 1833.

The plaintiff has produced the written cancellation, which, in a question between the plaintiff and Kerdel himself, if solvent, would be not only *primâ facie*, but very strong evidence against the latter. But still, even against Kerdel, it would not be evidence absolutely conclusive, but would be liable to be contradicted by competent evidence. But in so far as the creditors are parties to this action, not as representing Kerdel, but as claiming a preference on the stock of the company for the debts due by the company, it is no evidence whatever against them.

Kerdel's evidence proves that the dissolution took place only in October, 1833, and his evidence is corroborated by what took place in 1833.

If the advances made by the plaintiff prior to January, 1833, be compared with what he advanced in 1833, it will be seen that his conduct cannot be accounted for in any other way than as being still a partner.

But it has been maintained that Kerdel, if he thought fit, might in October, 1833, agree with the plaintiff that

the partnership, which had subsisted between them up to that date, should be dissolved on such terms as that each party should have the same claims and liabilities which he would have had if the company had actually been dissolved on the 31st December, 1832; that he actually did this; and that as he, if solvent, would be bound by this agreement, the creditors, who merely represent him, must be equally bound.

The answer to this is, that if by doing so, Kerdel transferred, gave, or ceded anything to the plaintiff to which the plaintiff had previously no right, his act, as having been done without any valuable or onerous consideration, is liable to be set aside by his creditors under the sixth section of the Ordinance No. 64, and therefore cannot be pleaded in bar against them.

2ndly. That no transaction which Kerdel could enter into with his co-partner can deprive the creditors of the company of any right or preference, which they had over the actual stock of the company for the debts due by the company to them.

On these grounds, he was of opinion that the date of the dissolution must be held to be in October, 1833.

That in virtue of the bonds and other transactions which took place between Watermeyer and Kerdel, Watermeyer is not entitled to claim from Kerdel absolutely the whole amount of his advances, but only such balance as remains after deducting therefrom his share of the losses and debts of the company; and that—whatever may be the amount of the claim which Watermeyer may have against Kerdel for repayment of advances made by the former to increase the capital of the company—the creditors of the company have a preference on the stock, funds, or assets of the company, for the payment of the debts due to them by the company, which must first be paid, before the plaintiff can be allowed to claim on the said stock, funds, or assets.

That for the final decision of this case it is necessary to ascertain the state of the partnership as on the day of its dissolution, and the extent of the funds, stock, and assets of the company, and of the debts contracted by the company prior to its dissolution, and then remaining due. That until this shall have been done, the plaintiff ought not to be allowed to prove to any amount against the estate of Kerdel. And that the cause should be remitted to the Master to ascertain those facts, and to report.

In conformity to the opinions of the majority of the Court, judgment was given for the plaintiff, as prayed, with costs.

POTGIETER AND TENNANT *vs.* MEYER AND ANOTHER.

Rules of Court, 18, 25.—*Barring.—Signing of judgment.*

Plaintiff barred from declaring under the rules of Court may still show such merits as will free him from having judgment signed against him; and even where judgment has been so signed, he will still be allowed to file declaration on merits shown and terms imposed.

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The Court held that, although the plaintiff was barred from declaring under the 18th Rule, yet that on a motion being made by the defendant under the 25th Rule, it was competent for the Court, upon merits, to refuse the defendant's motion, and to allow the plaintiff to declare; and in this case, accordingly, they allowed the plaintiff to file his declaration upon payment of costs.

In the similar case of *De Lima* vs. *Boniface*, 3rd February, 1835, where the plaintiff under the 18th Rule had been debarred from declaring, and the defendant had, in consequence, under the 25th Rule, obtained leave to sign judgment against him, the Court held that they might competently open up this judgment so signed against the plaintiff, upon his application showing merits, and to allow him to file his declaration upon such terms as the Court should impose.

Vide inter eosdem, 17th May, 1836.

SWAN'S EXECUTORS *vs.* VAN DER RIET, CIVIL COMMISSIONER OF UITENHAGE.

Land-surveyor's charges for Crown land surveys.

Waiver. Estoppel.

S., a land-surveyor, obtained and performed certain surveying work on Crown lands, first from the Landdrost and Heemraden of Uitenhage and afterwards, on their abolition, from the Civil Commissioner of the division. The surveys were conducted under certain Government regulations. By a lax practice of office, to which the surveyor, for his own interest, was a consenting party, the terms of payment prescribed by these regulations were departed from, resulting ultimately in a loss to the surveyor, who then brought action against

the Civil Commissioner for recovery of his fees. HELD, *on appeal from Circuit* (MENZIES, J., *and* KEKEWICH, J., WYLDE, C.J., *dissenting*), *that the surveyor, having consented for his own interest at the time to a deviation from, and contravention of, the provisions of the regulations, which deviation had brought about a non-existence of the special funds out of which he was entitled to payment, he was barred from maintaining his present action.* [*And on appeal to the Privy Council the judgment of the majority of the Court was affirmed. Vide Moore's P. C. Cases, vol.* 2, *p.* 177]

1834. Dec. 16. „ 31.

Swan's Executors vs. Van der Riet, Civil Commissioner of Uitenhage.

This action was brought by the plaintiffs, as the executors of the deceased James Swan, against the defendant, as being the Civil Commissioner of Uitenhage, and in that capacity representing the Colonial Government.

The declaration stated that from the year 1823 up to the year 1833, the deceased James Swan was employed and engaged first by the Board of Landdrost and Heemraden, and afterwards by the defendant as the Civil Commissioner of Uitenhage, as a sworn surveyor, to survey certain Government lands under the directions of the said board or of the defendant, respectively.

That he duly effected those surveys, and prepared and delivered to the said board, or to the defendant, the charts and diagrams of the lands so measured by him.

That the amount which has become due to Swan in respect of surveys made by him under the direction of the said board was Rds. 24,386, of which he had received from the board Rds. 6,233, and that the balance remaining due to him on the abolition of the board on the 1st January, 1828, was Rds. 18,153. That subsequently to March, 1828, sundry payments were made to the said Swan by the defendant in his said capacity, on account of and in diminution of the said debt of Rds. 18,143.

That the defendant was also indebted to him a further sum of Rds. 3,589 on account of surveys made in 1831, 1832, and 1833.

And that, upon closing the account between the defendant and Swan on the 22nd April, 1833, the defendant in his said capacity was indebted to Swan in the sum of Rds. 8,306 4 2 or £622 19*s.* 9¾*d.*, for which sum this suit was brought.

That after the commencement of this action, the defendant paid to the plaintiffs a sum of £66 4*s.* 2¾*d.*, in diminution of the amount sued for. Wherefore they prayed judgment for the balance, being £556 15*s.* 7*d.*

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The defendant pleaded, first, the general issue; and secondly, that if the plaintiffs shall be able to prove that the said Swan did make such surveys as in the said declaration are set forth, that the said Swan waved his right of recovering his costs and charges for such surveys against the defendant and the late board of Landdrost, &c., of Uitenhage, inasmuch as the said James Swan constituted and appointed one J. J. F. Roselt his agent for collecting the said costs and charges, due to him for such surveys, from the parties by whom the same were owing, and the said J. J. F. Roselt did, as such agent, collect divers sums of moneys due for such surveys, and pay the same or part thereof to the said James Swan, and the said J. Swan did give notice to the said Landdrost and Heemraden, and to the said defendant of such appointment as aforesaid, and did inform them that he did not expect or require them to collect and pay over to him any sums due for such surveys as aforesaid made by him.

In their replication, the plaintiffs joined issue with the defendant on the first plea; and with regard to the second plea, denied that the late J. Swan constituted and appointed one J. J. F. Roselt his agent for collecting the costs and charges due to him for any surveys made by order of the late Board of Landdrost and Heemraden of Uitenhage; and further denied that the said J. J. F. Roselt did, as such agent, collect any sum of money due for such surveys, and pay the same or part thereof to the said J. Swan in any capacity whatsoever, other than as secretary of the district of Uitenhage, in which capacity he alone was by law authorized to receive the said sums of money, and to account for the same to the said J. Swan.

At the trial of the case before the Circuit Court of Uitenhage, the plaintiffs put in

First,—The Government advertisement dated 16th July, 1813, which, after making sundry regulations respecting surveys, and providing the rate at which the sworn surveyors employed to make the surveys were to be paid their expenses, contains the following clauses:—Section 15. "The surveyor to be paid by a bill upon the District Treasury, quarterly, upon a return of the surveys, valuations, and diagrams; and consequently the Landdrost and Heemraden, if they have any doubt of the person's solvency (but in no other case), are entitled to call for security, or a deposit of the probable expenses, before they institute proceedings upon any application." Section 16. "In order to prevent all losses that might be sustained by the District Treasury in consequence of this regulation, every one shall be obliged, after the survey has been actually completed, to

pay on demand to the secretary of the district in which the land memorialed for is situated, the expenses which have attended the inspection and survey, and in case of any neglect, the amount shall be recovered by *parata executio*." Section 17. "In consequence of the additional trouble, the district secretary to be allowed 2½ per cent., to be collected from the parties on the amount of their bills."

Second,—The Government advertisment, dated 6th August, 1813, containing the following clause:—Section 8. "For the survey of a loan-place to be granted on perpetual quitrent, the land-surveyor, exclusive of the diagram, travelling expenses, and wagon-hire, shall not charge more than Rds. 100, unless he may be obliged from local difficulties to appropriate more than five days to make the survey, in which case he shall be allowed to charge Rds. 10. for every day over and above that time. The respective Landdrosts are therefore directed to pay strict attention hereto, when any account be presented to them to be paid out of the District Treasury, as mentioned in the Government advertisement of the 16th July last."

Third,—The Government advertisement, dated 30th September, 1814, containing the following clauses:—Preamble:—"It having been represented to His Excellency the Governor by the several magistrates of the country districts, that some inconveniences have been felt in consequence of the regulations for the expenses of surveys of lands, published on the 16th July, 1813, His Excellency has been pleased to direct the following amended set of regulations to be established and made public." Section 15. "The surveyor to be paid by a bill upon the District Treasury, quarterly, upon a return of the surveys, valuations, and diagrams; and the Landdrost and Heemraden are authorized to call upon the parties to deposit with the district secretary the probable expenses of the commission previous to setting out, for which a due receipt is to be given them; and in case of not obtaining the grant, the amount to be forthwith reimbursed." Section 17. "In consequence of the additional trouble, the district secretary to be allowed 2½ per cent., to be collected from the parties, on the amount of their bills."

The plaintiffs then called Jacob Glen Cuyler:—I was Landdrost of Uitenhage from 1806 to 31st December, 1827. James Swan became a sworn surveyor of that district in 1814. Mr. Knobel had been appointed surveyor of the district before Mr. Swan was appointed. Some confusion having been occasioned after the advertisement of 1813, it was agreed between the secretary and the surveyor that the secretary should collect the surveyor's fees, without

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bringing them at all into the accounts of the Landdrost and Heemraden. That mode of arrangement was made, I believe, in the Court-room. Both Swan and Knobel were acting as surveyors when this agreement was made. The Landdrost and Heemraden from that time considered that they had nothing to do with those fees. I do not recollect any occasion of any particular arrangement by Swan as to the fees of his office being managed in this way, as theretofore with former surveyors; but upon his appointment the matter was left with the secretary as before. Mr. Swan never complained to me on the subject, and I presumed, therefore, that he was satisfied. Had he complained, I should have called the secretary of the district to account. I do not remember that any communication of this arrangement between the surveyors and the secretary of the district was ever made to the Government. I do not know who proposed this mode of collecting the fees; but I remember the accounts were in confusion, and the surveyors were waiting for the settlement of their accounts, on account of which this mode of arrangement was acted upon. I considered it an arrangement between the secretary and the surveyors. The surveyors saw that they could get no work if they waited for the collection; but had any complaint been made to me on the subject, I should have interfered so far as my authority would have let me. We never required the applicants to make any deposits. We put faith in them that they would pay the fees. No particular instructions were given to Mr. Roselt on this subject. He carried on the business in the same manner as the person he relieved. The fees of inspection were left by the Landdrost and Heemraden to be collected in the same way by the district secretary.

John Jacob Fredrick Roselt:—I was appointed secretary to this district in February, 1824, and continued in office till January, 1828. I succeeded Mr. Steadel as secretary, but the office had been actually under the conduct of Mr. Lange. There were unsatisfied claims of fees due to Mr. Swan for surveys at the time I came into office. I arrived in July, and about fourteen days afterwards a book was handed to me, containing outstanding claims for inspection to Landdrost and Heemraden, to field-cornets and surveyors; and I was told by Mr. Lange that I was to collect these fees, and pay them over to the surveyors, and that the Board was to have nothing to do with it, in consequence of confusion from the former secretary's having intermixed these claims in the Board's accounts, and in consequence of no deposits being taken. A few days afterwards Mr. Swan came to my office, and entered into con-

versation upon this matter. I told him what Mr. Lange had said to me; and, to the best of my recollection, he said, "It is true; do you continue to do as the former secretaries did?" I showed him the unsatisfied claims which had been handed to me; told him that I had written to the parties to pay forthwith their accounts, with which he was satisfied. Mr. Swan also, on that occasion, or a few days afterwards, said, "We are strangers to each other, but I will tell you to be very careful in accounting to me as to these fees. I have been a severe sufferer by the former secretary, Mr. Allen, and am still suffering from Mr. Steadel," or that "Mr. Steadel owes me a considerable sum," or words to that effect, "and I must request you to be punctual in paying me." I continued to collect from time to time the amount of the bills he handed to me. Mr. Swan at the beginning drew the fees as I got them. At one time he was in my debt. And I continued to collect for Mr. Swan up to the middle, I believe, of 1828, when, receiving a communication from the civil commissioner as to the amount of unsatisfied claims for surveys, I furnished the list of particulars thereof, now produced, showing the balance due to Swan to be Rds. 15,052 4,—23rd September, 1828. There is no doubt on my mind but that this list was shown to Swan before I handed it to the civil commissioner, and I am sure he never made any objection to it. Swan continued to draw upon me up to October or November, 1829, when I surrendered my estate as insolvent. This account-current was made by me about the time I surrendered my estate. I made it out, and furnished Swan with it while he was alive. No moneys ever passed through my hands belonging to Swan, except these fees. I had no concerns of his under my management as his agent, except as to some few accounts for private surveys, which are introduced into the account-current for surveys made by him as a surveyor, but not as a Government surveyor. I had no other business with Swan except as to these fees, upon which he drew from me from time to time. There are two, three, or four instances in which Swan collected part of the fees due to him, and desired me to give credit to those parties, and receive the balances. When Swan went out in 1826 upon the surveys, he was aware that no deposits had been made by any one individual.

Cross-examined:—I am perfectly certain I furnished Swan with a copy of this account-current, dated 31st December, 1829. I never referred any of these accounts as to the surveyors' fees, after my appointment, to the Landdrost and Heemraden. I did not consider that I was under the control of the Landdrost and Heemraden in consequence

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of this private arrangement. I did not take any proceedings against the defaulters as to the surveyors' fees, because Mr. Swan was not willing that I should press any of his debtors for money due for his services. I met Mr. Swan's orders whenever he drew upon me.

Johannes Werendly van der Riet:—I am Civil Commissioner of Uitenhage, and was so on 1st January, 1828. On the 9th May, 1828, Swan presented a memorial to Government, stating that there was a large sum due to him for surveys, and praying that the civil commissioner should be directed to investigate into his accounts, and to issue from the Treasury such sum as he should find to be due to the memorialist. This memorial was referred to me for my report, which I sent in on the 28th June. In reply, I received a letter from the Secretary to Government, dated 9th July, stating that in my report I had omitted to state what part of the sum due to Swan had been paid into the Treasury by those for whom surveys had been made, to which extent Swan might be paid, but that the Lieutenant-Governor was not at present prepared to go further. I sent a copy of this letter to Swan. I received also another letter from the Secretary to Government, dated 29th August, 1828, in which he stated, "I am directed by His Honour the Lieutenant-Governor to acquaint you that, as he does not understand why the late Board of Landdrost and Heemraden should have had all the places mentioned in the list which you have transmitted, surveyed before deposits were made, it will be necessary for you to call upon those persons for whom these farms were measured, without delay." The only account of the sums due to Swan was dated 23rd September, 1828, signed by Roselt, which Swan saw very often in my office and examined it. No claim was ever made by Swan beyond this account. I proceeded hereupon to collect the arrears of fees due to Swan, and collected Rds. 10,791 1 4, which I paid over to Swan. The amount still unpaid of fees to Swan for surveys is Rds. 3,861 2 2. I could not collect this amount, as the parties refused to pay it. They complained that Mr. Swan had not pointed out the beacons, and had measured the lands when they were not present. I informed Swan of this by letter, dated 20th September, 1831. I received a letter from him in reply, dated 21st September, 1831, in which he referred to the Government advertisement of 1814, directing the land-surveyors to be paid quarterly, and stating that he had nothing whatever to do with the people for whom the places were surveyed, and that, having obeyed the written instructions with which he was furnished, the Government was responsible to him for the amount.

[The memorial and letters referred to by the witness were put in and read.]

Jan George de Villiers:—I was appointed Clerk of the Peace for this district in August, 1829, and also Assistant Registrar of Slaves. Soon after my arrival I discovered that Swan was liable to a fine of Rds. 100, for not having received the transfer of a slave in due time. He came to my office respecting it. He said, "I cannot pay it, because my banker, Mr. Roselt, is gone to Cape Town," and begged me to allow him time till Mr. Roselt's return. He told me of his losses by Mr. Allen, as also by Mr. Steadel, who was, however, still paying him from time to time. He said he was fearful of the same result as to Mr. Roselt, who had received fees that he had not paid over to him. I asked him how he could suffer by Mr. Roselt, as applicants for land were bound to make a deposit. He said that the parties, not being able to pay at the time of making application, he was willing to wait, and, therefore, had not insisted upon the deposits, or have deviated from the law, or some such words.

The defendant called no witnesses.

	Rds.	sk.	st.
It was admitted by the parties that the amount received by Roselt, and not paid to Swan, was	3,195	4	0⅓
And that the arrears due by applicants on surveys by Swan amounted to ...	3,861	2	2
	7,056	6	2⅓

Whereupon the Court (Chief Justice) gave judgment for plaintiffs; damages, Rds. 7,056 6 2⅓.

The defendant appealed to the Supreme Court against this judgment.

This day, the *Attorney-General* for the appellant, and *Cloete* for the respondent, were heard on the appeal.

Cur. adv. vult.

Postea (31st December, 1834).—WYLDE, C.J., adhered to his former opinion, and was for affirming the judgment. He held that nothing which Swan had done under the arrangement he made with the Landdrost, Heemraden, and District Secretary barred him from now demanding payment from the Government; and that the plaintiff's replication had been proved, and was a sufficient answer to the defendant's plea.

MENZIES and KEKEWICH, JJ., held that Swan, by reason of deviation from and contravention of the provisions of that law under which alone he could maintain that the

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Government were liable to him for any part of the expen[illegible] of the surveys made by him, was barred from now claimi[illegible] from Government the loss which he had sustained; and [illegible] reason of the non-existence of the funds which by that l[illegible] had been provided for defraying the expenses of surve[illegible] and the non-existence of which funds had been occasion[illegible] solely by a deviation from and coutravention of those re[illegible]lations which had been made by that law for the expr[illegible] purpose of insuring the recovery from the parties interested, of the amount necessary to defray the expense of survey, to the whole of which deviation and contravention it was proved that Swan had been a consenting party, and of a considerable part of which it was proved that, induced by what he conceived to be his interest at the time, he had actually been the cause.

In conformity with the decision of the majority of the Court, the judgment of the Circuit Court was reversed, with costs.

[NOTE.—On appeal to the Privy Council, the judgment of the majority of the Court in this case was confirmed.—*Vide Moore's P. C. Ca., vol.* 2, *p.* 177.]

A. *vs.* B.

Martial Law.

Provisional sentence granted, notwithstanding existence of, in cases where debtor made no appearance.

1835. Feb. 2. — A. *vs.* B.

In the provisional roll of this day there were several cases in which the defendants resided in Albany, in which martial law was proclaimed, and is still in force.

But the Court held that this was a circumstance of which the Court could not take notice, at least in this stage of the proceedings, and gave provisional sentence against the defendants.

BARRY *vs.* VAN RENSBURG.

Martial Law.

Provisional sentence granted, notwithstanding existence of, in a case where the debtor made appearance and objection.

Feb. 16. — Barry *vs.* Van Rensburg.

The Court gave provisional sentence against the defendant, who resided in the district of George, then under

1835.
Feb. 10.

Barry vs. Van Rensburg.

ıartial law, although he objected to being obliged to answer) the summons, as he was daily liable to be employed in lis Majesty's service.

Same found, *Muller* vs. *Munnik*, 22nd May, 1846, where ıe defendant, on receiving personal service of the summons, ıd made this objection.

Van Renen *vs.* Rorich.

ecognizance to keep the peace null for want of authority in officer taking and non-specification of period of endurance.

Feb. 2.

Van Renen vs. Rorich.

The Court, on motion, ordered the recognizance taken ›fore the Judge and Superintendent of Police, whereby an Renen was bound in the sum of £50 "to keep the ıace, and be of good behaviour towards the King and all ıs people, aud especially towards S. F. Rorich," to be rought into Court, and on 3rd February thereafter the ourt cancelled the recognizance, in respect that it did not ppear therefrom that the Judge and Superintendent of 'olice was a justice of the peace (he having no jurisdiction › take such recognizance as Judge and Superintendent), nd because there was no time specified for the endurance f the recognizance.

Gird *vs.* Usher.

Resident Magistrates' Rules, 9–11.

May 19.

Gird vs. Usher.

This was an application for review of a sentence of the esident Magistrate of Cape Town, whereby he sustained vith costs) an exception of informality of the proceedings ıken by the defendant, on the ground that the copy of one ' the accounts sued for, and which had been served on ›fendant along with the summons, had not been certified y the Magistrate's clerk as a true copy.

The Court (Wylde, C.J., absent) reversed the sentence ' the Magistrate, with the costs, to plaintiff, which had ›en incurred in consequence of the exception having been ıstained and the costs of review.

The defendant did nor appear.

GRIMWOOD *vs.* BALLS.

Exceptio rei judicatæ not pleadable in respect of sentence of absolution from instance.

1835. Feb. 24. — Grimwood vs. Balls.

This was an application for review of the sentence of the Court of the Resident Magistrate, given against the plaintiff on the 5th February, 1835, dismissing his complaint, on the ground that the same case had been tried last court day, 28th January, 1835, and judgment given against him.

The judgment given on the 28th January in the case then pending, and which was *super eadem materia* with that brought on the 5th of February, was of the following tenor:—"Judgment: Dismissed *pro Deo*."

The Court held that this judgment had only the effect of an absolution from the instance, and not of a judgment for the defendant; consequently, that in the case brought on the 5th February the defendant was not entitled to plead, or the Magistrate to give effect to the plea of *res judicata*, founded on the judgment of dismissal given on the 28th January, and therefore reversed the sentence of the Resident Magistrate given on the 5th February, with costs.

STOLL'S TRUSTEE *vs.* KRIEGE AND BOSMAN.

Bond: plea of no consideration.

Payment: defence of. Agency.

M., as agent for K., senior, sold certain slaves to K., junior, with B. as surety; K., junior, to pass a bond in favour of S., who was to advance the money to S., who was thereupon to hand over the money to M., who was to satisfy another debt due by K., senior, his principal. The bond was duly executed, and the slaves transferred to K., junior; but the money was never paid by S., who died shortly afterwards. S.'s trustee sued on the bond. Defendants pleaded no consideration. HELD, *that there was an equivalent to payment by S. to defendants, and that plaintiff could recover, however matters might stand between M. and the estate of S.*

Aug. 13. — Stoll's Trustee vs. Kriege and Bosman.

This action was brought by plaintiffs to recover from the defendants payment of a bond for £112, executed by Kriege as principal debtor, and Bosman as surety and joint principal debtor, in favour of the late Mr. Stoll, for money lent

and advanced by him to the defendant Kriege. (*Vide inter eosdem*, 10th February, 1835.)

The defendants admitted the execution of the bond by them, and in defence pleaded that the consideration or cause of the debt is stated in the said bond to arise from money lent and advanced by the said late J. W. Stoll to the defendant, J. H. Kriege, whereas in truth the said sum of Rds. 1,500 was not lent to the said Kriege, nor any part thereof; and this the said defendants are ready to verify, and they tender issue thereon, &c.

The plaintiff put in the bond sued on.

The defendants called

Carel Christian Mocke:—I am an agent, and live in Cape Town. I know the bond now shown me (that put in by plaintiff). It was executed at the Paarl, in my presence, in February, 1834. I sold certain slaves belonging to J. D. Kriege, the father of the defendant, to the defendant, and Bosman became his security for the price. The condition of the sale was that the defendants were to pass this bond for the price in favour of Mr. Stoll, who was to advance the money to the defendant, Kriege, who was to pay it to me to discharge a debt of old Kriege. The bond was afterwards sent to me about a fortnight after its execution. On getting this bond I immediately went to Mr. Stoll, and asked him for the money, who said, "I am busy; leave me the bond, and I will send you the money by Christian, my messenger, in the afternoon;" and I left the bond with him, and went away. That and the following day passed without my receiving the money. I then called again on Mr. Stoll, and took with me Mr. Van Helsdingen, and we met Mr. Stoll coming out of his office. I said to him, "You have forgotten to send me the money for the bond; be so kind as to let me have the money, for I wish to settle the business." He said, "I forgot it; I must just now go to Council, but I will send it you in the afternoon." I never received it. I never saw Mr. Stoll personally again. He was soon after taken ill, and when I called at his house I could not get admittance, as he was so ill that he could not see any one. I afterwards wrote a letter to him, dated 16th June, 1834, which is now shown me. [It was admitted by plaintiff that this letter had been received by Mr. Stoll. It was put in, and was to the following effect:—"The estate of the late Hoffman lies still unclosed, and the creditors are becoming impatient. I handed you the two bonds of the two brothers Kriege for the purchase of the four slaves of Jan Daniel Kriege, amounting together to Rds. 3,500, upon which you have paid a bill of Rds. 1,600 of J. G. van Helsdingen in the Discount Bank. Moreover, I have given you, upon

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Stoll's Trustee vs. Kriege and Bosman.

your request, out of the estate, on the 26th October, 1832, a draft on the Bank for Rds. 2,500. On the other hand, you have also again paid the purchase amount of the slave Adam in question,—I mean to Mr. Zeederberg—Rds. 700; so that, if I am not mistaken, a balance is remaining in your hands in favour of the estate, exclusive of the interest on both the bonds, of Rds. 3,700, together with the expenses of transfer, &c., of A. Levien, Rds. 1064, and the Rds. 2,000 for the third bond for the remaining slaves of said Kriege, to be passed by myself in your favour, for which you have accepted to advance the money, in order to settle the claim of Van Helsdingen, for which the bond of Kriege was pledged, and which he, Van Helsdingen, paid to Wicht. This one and others hinders me from closing the estate. If I am, therefore, not requiring too much of you in your sickly state, and you could settle these items in one way or another, it would give me much pleasure."] I got no answer to this letter. I never received the amount of the bond from Mr. Stoll, directly or indirectly. I was authorized by the defendant Kriege to receive the money from Mr. Stoll, I had other accounts with Mr. Stoll, but not connected with this bond. I have paid the amount of the slaves purchased by the defendant to Van Helsdingen on account of Daniel Kriege, and, therefore, Mr. Stoll still owes me the money. I believe the bill mentioned in the letter as having been paid by Stoll was paid by him before I gave him the bond now sued on. I had advanced Mr. Stoll, who was only a concurrent creditor of Hoffman, Rds. 2,500. Van Helsdingen was a preferent creditor, and was pressing me for the money, and I therefore asked Mr. Stoll either to repay me the Rds. 2,500, or to take up the bill. Although I have written "So that," &c., in the letter, I did not mean to set off the Rds. 1,600 paid on Van Helsdingen's bill against the sum to be paid by Stoll to defendant in consideration of the bond now sued on.

After hearing the counsel of both parties on the import of the evidence, the Court held that the effect of the transaction between Stoll and Mocke, whereby the defendant had obtained the transfer of the slaves, and whereby the price due by defendant for the slaves had been paid to the seller, and the defendant consequently discharged thereof, was equivalent to, and in effect was, payment to defendant by Stoll of the amount of the bond sued on; and therefore that, however matters might stand between Mocke and the estate of Stoll, the plaintiff was entitled to recover the amount of the bond from defendants. Judgment for plaintiff as prayed, with costs.

BENNINGFIELD, APPELLANT, *vs.* DUCKITT, RESPONDENT.

Resident Magistrate's jurisdiction. Splitting of demands. One substantive cause of action, exceeding in amount the jurisdiction of the Magistrate, cannot collusively be split into two to bring both within such jurisdiction.

1835. Aug. 18. — Benningfield Appellant, *vs.* Duckitt, Respondent.

This was an appeal from the sentence of the Resident Magistrate of Cape Town under the following circumstances:

The appellant was contractor to the Rondebosch Police Establishment, and respondent contractor to the Rondebosch Road Establishment.

In February last, respondent sent three wagons with barley, intending the same to be delivered to the Storekeeper of the Rondebosch Road Establishment, but by mistake addressed the letter containing the invoice sent along with it to the overseer of the Police Establishment, who, knowing that the respondent was not the contractor for the department, before receiving it, sent the letter and invoice to appellant, who endorsed upon it as follows:—

"Mr. Rode,—You may receive the barley and weigh, giving a receipt, as I must see Mr. Duckitt."

In consequence of which the barley was received by the Police Department on account of and credit given for it to appellant. In settling with appellant for this barley, respondent claimed the price which, by his contract with the Road Department, he would have been entitled to receive from them, which appellant refused to allow. The total quantity of the barley in dispute was sixty-three muids, and the total value £25 9*s.* 4*d.* Respondent, instead of making out one account for the whole, made out two accounts against appellant, one for thirty muids of barley to the value of £12 2*s.* 6*d.*, and the other for thirty-three muids, to the value of £13 6*s.* 8*d.*

On the last of those accounts was written:—

"I do hereby cede and transfer all my right and title to the above to and in favour of Mr. J. M. Maynard, value received.

"Cape Town, 27th April, 1835.

"CH. DUCKITT."

And a few days afterwards the appellant was summoned before the Court of the Resident Magistrate for the amount of the first account at the instance of respondent, and for the amount of the second at the instance of Maynard (who acted as respondent's attorney in the first mentioned).

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On the day of the defendant's appearance in Court, he objected that the account in the case at the instance of the respondent, and that in the case between appellant and Maynard were one account, and formed one transaction, the barley having been delivered at one and the same time; that the value of the whole of the barley amounting to £25, the appellant could not be sued for it in the Court of the Resident Magistrate, who had only jurisdiction to the amount of £20, and that the respondent was not entitled collusively to split the single transaction into two causes of action for the purpose of bringing them within the jurisdiction of the Resident Magistrate.

The Magistrate overruled the objection, and the appellant appealed.

On hearing counsel for the parties, the Court held that the separation of the transaction into two accounts, and the cession of one to Maynard, was done collusively by the respondent, for the purpose of bringing the single cause of action between him and appellant under the jurisdiction of the Resident Magistrate's Court, which otherwise would not have been competent to try the case,—sustained the appeal, and reversed the sentence of the Magistrate, with costs.

BENNINGFIELD *vs.* MAYNARD.

Benningfield, vs. Maynard.

In this case, in which similar proceedings had taken place, and a similar sentence had been pronounced by the Court of the Resident Magistrate, the Court, on appeal, reversed the sentence of the Magistrate, with costs.

HOLLIDAY, Q.Q. WISE, *vs.* W. G. ANDERSON, Q.Q. ANDERSON, SENIOR.

Partnership power, what is not a revocation of.

W. G. A. held a power of attorney from W. A. and R. W., carrying on business as partners in England and the Cape Colony. The firm was dissolved, and the partners, without specially revoking the power to W. G. A., nominated him and one H. to wind up the Cape business. HELD, *that W. G. A. could not be interdicted by H. from granting sole receipts, and otherwise winding up the partnership estate.*

The following were the facts of this case:—

William Anderson and R. Wise carried on business as merchants in this Colony, under the firm of Wm. Anderson, Senior, and Company. The business of the company was carried on by the respondent, W. G. Anderson, as their agent, by virtue of a power of attorney to that effect, granted to him by the said firm of Wm. Anderson, Senior, and Company.

The following letter was written by the said Wm. Anderson and R. Wise, and received by the applicant and the respondent:—

"Liverpool, September 18, 1834.

"To Messrs. JOHN HOLLIDAY and W. G. ANDERSON,
Cape of Good Hope.

"GENTLEMEN,—We have come to an arrangement for the winding up of the concerns of our late partnership, and it is agreed between us that the affairs of our different foreign establishments shall be wound up by the persons at the head of those establishments, under the direction of Mr. Anderson and Mr. R. J. Fairbridge (the friend of Mr. Wise) in London, and of Mr. Wise and Mr. W. Anderson, junior (the son of Mr. Anderson), in Liverpool, subject to further stipulations, in case of disagreement between these persons, the requisite directions to be given by the above-named persons for the London house, as most consistent with the previous dealings in respect of the matters for which such directions are to be given.

"We therefore request that you will take charge of the property, and co-operate in the winding up of the concern of the establishment of our late firm at your place, under the directions to be from time to time forwarded to you, pursuant to the above arrangement; and it being our wish that all our concerns shall be closed with the utmost expedition that may be consistent with the interest of ourselves and our constituents, we request you will use every means in your power to bring the affairs under your management to a speedy settlement, and it is arranged that the business is to be transacted without charge to the old concern, and that Mr. W. G. Anderson shall look for remuneration to Mr. Anderson, and Mr. Holliday to Mr. Wise only.

"W. ANDERSON.
"R. WISE."

1835. Nov. 2. — Holliday, q.q. Wise, vs. W. G. Anderson, q.q. Anderson, Senior.

In consequence whereof, the following dissolution of the partnership of the firm of Wm. Anderson, Senior, and Company was published in the *Government Gazette* of this Colony on the 13th January, 1835:—

"The partnership heretofore subsisting in Cape Town between William Anderson and Robert Wise, under the firm of Wm. Anderson, Senior, and Company, merchants, Cape Town, is dissolved, and notice thereof hereby given. The winding up and settling of the said partnership affairs is to be conducted by W. G. Anderson, heretofore agent of the said firm at the Cape of Good Hope, and John Holliday, of Liverpool, now at the Cape of Good Hope, by whom all debts owing to said partnership are to be received, and to whom all persons to whom the said partnership stand indebted are required immediately to send in their respective accounts for settlement.

"W. G. ANDERSON,
"Acting for the co-partnership.

"JOHN HOLLIDAY,
"Acting under special power of R. WISE."

Thereafter the following notice was, in September, 1835, published by the applicant in the *Gazette*:—

"All persons who may be or become indebted to the late firm of Wm. Anderson, Senior, and Company, merchants, Cape Town (conducted heretofore by William George Anderson, merchant, here) for purchases of goods belonging to the said firm, or otherwise, are required, in terms of the notice of dissolution of said late firm, to pay their debts or bills only upon the joint receipt of said William George Anderson and of the undersigned, or such other persons as the undersigned may appoint to act in his stead, of which public notice will be duly given; under certification that no other payments than those so receipted will be held valid or legal.

"J. HOLLIDAY,
q.q R. WISE, Partner of the late
firm of W. ANDERSON, Sr., & Co.

"Cape Town, 25th September, 1835."

Thereafter the applicant caused the following summons to be served on the respondent:—

"Let the defendant, &c., show cause why an injunction should not be granted at the instance of the plaintiff, as

the duly constituted agent of Robert Wise, merchant, Liverpool, a partner of the late firm of Wm. Anderson, Senior, and Company, of the Cape of Good Hope, against the defendant, W. G. Anderson, heretofore agent of the said late firm of Wm. Anderson, Senior, and Company, debarring and interdicting the said W. G. Anderson from receiving debts due or to become due to the said late firm of W. Anderson, Senior, and Company in this Colony, except upon the joint receipt of him and the said John Holliday, and from remitting any moneys coming into his hands, for or on account of the said late firm, to England, or elsewhere, or otherwise applying the same, except with the approval of the said John Holliday, or otherwise, why the said defendant should not grant to the said John Holliday, for and on behalf of the said R. Wise, his own personal guarantee duly to account for all moneys, which have or may come into his hands from time to time, for or on account of the said late firm, and that the same shall be placed in the Government Discount Bank in their joint names, so that the same or any part thereof shall not be remitted to any one, or in any manner applied or disposed of, without the knowledge and consent of the said J. Holliday, acting as aforesaid, first had and obtained."

This day, *Cloete*, for the applicant, maintained, in support of the injunction, that the partnership power of attorney previously held by respondents was revoked or rendered void by the dissolution of the partnership; that the letter of instructions of the 18th September, 1834, bound the respondent, if he acted at all, to do so in conformity with those instructions, and therefore in concert with Wise's agent, the applicant; that the respondent could not object to their authority, because he had recognized them by the advertisement of the dissolution of the firm framed under them; and that therefore he could not be suffered now to repudiate them, or to act independently of Holliday, who was thus authorized by the late firm to co-operate jointly in the management of their concerns.

Without calling on the *Attorney-General* for the respondent, the Court refused the injunction, with costs.

The Court held that the letter of the 18th September, 1834, did not revoke the power of attorney which the respondent held from the firm, or divest him of the powers he held under it. That neither was it revoked by the dissolution of partnership as far as related to winding up the concern of the firm here. That the respondent alone was authorized to give receipts for partnership debts, which would bind the partnership; and whatever power of interference in other respects the applicant might have of inter-

1835. Nov. 2. Holliday, q.q. Wise, vs. W. G. Anderson, q.q. Anderson, Senior.

fering in the winding up, he could not join in granting such receipts, not being clothed with authority to do so from both the parties. That the respondent was thus responsible for the sums received on the partnership account. That the instructions in the letter of the 18th September did not prohibit him from having the remittances made to the London house. That the question here was not whether the respondent could force the applicant to pay over to the respondent money which had been received by the applicant. The object of the injunction was to restrain the respondent from remitting money which had been paid to him to the London house. That there was no allegation by the applicant of any mismanagement on the part of the respondent, or of any improper or fraudulent application or use of the funds passing into his hands. The only complaint was, that he had remitted them to one partner instead of to the other. That, as Wise had not taken care to have the old partnership power of attorney in favour of respondent expressly revoked, and to have the applicant's name inserted in a new power granted by both the partners, there was no ground for calling on the Court to exercise summary jurisdiction in a case where no issue could be sustained in law.

✓ Luck *vs.* Owen.

Where a defendant is regularly in default, he cannot, on the trial of the case, appear personally or by counsel.

Nov. 5. Luck vs. Owen.

In this case, which was undefended, the Court declared that in future, when a defendant had by his default been debarred from pleading, and the case had been set down for trial as undefended, and the defaults and requisite notices duly proved, the defendant shall not be permitted either personally or by counsel to appear, or in anywise interfere in the trial of the cause.

Martheze *vs.* Van Reenen.

Appeal: mode of fixing amount.

Claims in convention and reconvention, and the judgments given thereon, must be held as separate and distinct claims and judgments, and the amounts awarded on each cannot be added so to entitle an appeal. Only the

amount of the balance sued for, and not the original amount of the debt, can be taken in computation in fixing the appealable amount.

1838. Aug. 30. — Martheze vs. Van Reenen.

In this case, Martheze, the plaintiff in convention, sued for £352 12*s.*, as wages due to him by defendant, Van Reenen, who, in defence, pleaded the general issue. Van Reenen also, as plaintiff in reconvention, claimed from Martheze two several sums, viz., first, £451 19*s.* 9⅜*d.*, and secondly, £17 10*s.* 4¼*d.* as the balance still due on a debt, the original amount of which was £62 10*s.* 4½*d.* The Court, on the 19th instant, had given judgment for Martheze as plaintiff in convention with costs, and absolved him as defendant in reconvention from the instance with costs.

Cloete, for Van Reenen, in support of the petition of defendant for leave to appeal against the above judgments, maintained that, in order to ascertain whether this was an appealable case or not, he was entitled to take into one computation both the amount of the claim in reconvention and the amount of the claim in convention,—in fact, to hold the claims in convention and reconvention as one action, in which both these amounts were at issue.

But the Court held that the claims in convention and reconvention, and the judgments given thereon, must be held as distinct and separate claims and judgments; and that the amount decided on one of the claims could not be taken in computation with the amount decided on the other claim, in order to enable the defendant to appeal against both judgments.

Secondly,—*Cloete*, for Van Reenen, maintained that he was entitled to appeal against the judgment given against him on the claim in reconvention, because he had claimed in reconvention £451 19*s.* 9*d.*, and £17 10*s.* 4½*d.*, in respect that this latter sum was claimed as the balance remaining due of a claim consisting of £62 10*s.* 4½*d.*, and that he was entitled, in ascertaining the amount of the claim in reconvention, to add not merely the balance of £17 10*s.* 4¼*d.* now sued for, but the whole amount of the debt as it had originally been due, which would bring the joint amount up to £514 10*s.* 1¼*d.*

But the Court held that only the amount of the balance sued for, and not the original amount of the debt, was to be taken into computation; and dismissed the petition for leave to appeal with costs.

GRANET, RESPONDENT, *vs.* JANSEN AND OTHERS, APPELLANTS.

Rule of Court No. 190. *Sentence of Resident Magistrate. Review. Summons.*

In an application to the Supreme Court for review of a sentence of a Resident Magistrate's Court, the summons must state the grounds of review.

1836. Nov. 30

Granet, Respondent, *vs.* Jansen, and Others, Appellants.

This was an application for review of a sentence given by the Resident Magistrate, of Cape Town, in a criminal prosecution for assault at the instance of the respondent against the appellants.

Brand objected to this application on the ground that the summons merely called on the respondent to show cause "why this sentence should not be corrected or set aside, upon the ground that the same is erroneous and contrary to law."

Whereas by the 190th Rule it is provided that "the summons shall state, shortly and distinctly, the grounds upon which the said party seeks to have the said proceedings set aside or corrected."

On this ground, the Court refused the application for review, with costs.

Same day, in the case of *Kennedy, Respondent,* vs. *Jansen and Others, Appellants,* which was precisely similar to the last, for the same reason the Court dismissed the application for review, with costs.

Same found in *Stevens* vs. *Anderson,* 29th February, 1844 (*post*).

Et vide Clerk of the Peace vs. *Dreyer,* 23rd November, 1837 (*post.*), where the same objection was sustained, but under different circumstances.

IN RE BERRANGÉ.

Attorney's Articles. Rule of Court 149.

No service can be taken into computation as qualifying for admission as an attorney except service subsequent to the date of the written contract.

1837. July 12.

In re Berrangé.

In this case, Mr. Berrangé had, in November, 1831, commenced serving Mr. Hutchinson as a clerk, and on the understanding, as was alleged, that he was to be instructed in the profession of the law, but in consequence of ignorance

1837. July 12.

In re Berrangé.

or neglect of the 149th Rule of Court, no written contract was executed between the parties until 1st of July, 1833, when they executed a contract binding Mr. Berrangé to serve Mr. Hutchinson as a clerk for five years from that date. Mr. Berrangé had, therefore, no title to be admitted an attorney, unless the Supreme Court should allow the previous service of Mr. Berrangé, from the 1st of July, 1832, to be computed as good service under the rule.

Mr. Berrangé this day presented a memorial, setting forth the above circumstances, and praying to be admitted as an attorney.

But the Court held that the rule was imperative, and that no service could be taken into computation as qualifying for admission, except service subsequent to the date of the written contract.

Wilkinson *vs.* Public Prosecutor.

Conviction by Resident Magistrate quashed where the sitting Magistrate gave evidence against the prisoner.

July 21.

Wilkinson, *vs.* Public Prosecutor.

This was an application for review of a sentence pronounced by the Police Court of Simon's Town, whereby Wilkinson was found guilty of violently resisting a police constable, he being in the due execution of his duty, and adjudged to seven days' imprisonment with hard labour, and for setting aside the said sentence on the ground of illegality, in respect that the judge gave evidence as a witness against the appellant.

The *Attorney-General*, for the respondent, admitted that the Matthew Gregory Blake who gave evidence was the judge by whom the case was tried.

The Court, on this ground, set aside the proceedings and sentence, and quashed the conviction.

Two other convictions, obtained by the Public Prosecutor against the appellant, were quashed on the same grounds.

Breda *vs.* Hofmeyr.

Trespass, damages for. Occupation, possession, title.

It is sufficient for a plaintiff bringing action for trespass to prove his lawful occupation and possession at the date of such trespass, and not his title to the land.

1837.
Aug. 4.
„ 15.

Breda vs. Hofmeyr.

The plaintiff and defendant were respectively the proprietors of the coterminous estates of "Orangezicht" and "Nooitgedacht." A dispute arose between them as to which had the right of property in a certain small piece of ground, which was admitted to have been originally included in "Nooitgedacht," but was alleged by the plaintiff to have been sold and transferred to his predecessor by the defendant's predecessor. The defendant denied this allegation, and, to assert his title, cut down some fir-trees which were growing on it; wherefore the plaintiff brought this action, the declaration in which set forth that the defendant was summoned in an action for trespass and damages, &c. That at and before the time of the injuries hereafter complained of, the said plaintiff being proprietor of the freehold estate "Orangezicht," situate in this Table Valley, was also, and still is, possessed of a certain piece of freehold land, being in extent 69 square roods and 113 square feet, adjoining the said place "Orangezicht," which said piece of land formed part of the freehold place "Nooitgedacht," also situate in this Table Valley, and now the property or in the possession of the said defendant, and which said piece of land, so possessed by the plaintiff, was cultivated and planted with many fir-trees, to the great ornament of the plaintiff's said place, "Orangezicht;" yet that the said defendant, well knowing the premises, but contriving and intending wrongfully and unjustly to injure the plaintiff, and to cause great damage and injury to his said estate "Orangezicht," did, on or about the 24th and 25th September, 1836, by himself and his servants, unlawfully enter upon the land so occupied, and in the lawful possession and enjoyment of the said plaintiff, and did then and there by force cut down and fell to the ground a large quantity of the said fir-trees, &c., to the great damage and injury of the said plaintiff; in respect whereof the plaintiff claimed as damages £75.

In his plea, the defendant admits that on and before the 25th and 26th September, 1836, the plaintiff was proprietor of "Orangezicht," and that defendant is the proprietor of "Nooitgedacht," but denies all the other matters set forth, and joined issue thereon.

After both the parties had led their evidence, and been heard thereon, the plaintiff prayed that the Court should not only award him damages for the trespass, but declare his right of property in the piece of ground in question.

Cur. adv. vult.

Postea (August 15, 1837).—The Court gave judgment for the plaintiff for £5, and costs.

1837
Aug. 4.
" 15.

Breda, *vs.* Hofmeyr.

The Court held that the pleadings were so framed that, whatever opinion the Court might entertain on the legal title of the plaintiff to the property of the piece of ground on which the alleged trespass was committed, all they could in this action decide was, whether, at the time the alleged trespass was committed, the plaintiff was in the lawful possession and occupation of the piece of ground in question, and whether the defendant trespassed on the ground, then being in the lawful possession and occupation of the plaintiff, and, if so, what damage he occasioned to plaintiff by such trespass.

The Court held that it was proved that the ground was in the lawful possession and occupation of the plaintiff; that the defendant, when it was so possessed and occupied by plaintiff, committed on it a trespass, whereby plaintiff was injured to the amount of £5.

(N.B.—The Court were of opinion that the plaintiff had proved that the piece of ground in question was his property.)

Ludekins *vs.* De Villiers.

Alimony, amount of, ordinarily allowed for illegitimate child.

Nov. 2.
" 7.

Ludekins *vs.* De Villiers.

In this case, the plaintiff claimed £200 damages in respect of her having been seduced by the defendant: £89 14*s.*, being at the rate of £3 per month, for the support of the child which the defendant had procreated by her, from its birth, and £3 per month for its future aliment till its death or marriage.

By consent, the Court gave judgment for plaintiff for £75 as damages, inlying expenses, and alimony for the child for the time past, and also for £1 10*s.* a month for its alimony, to be paid until she shall attain the age of sixteen years, and costs.

Postea (November 7).—*Cloete*, for defendant, stated that the Court had been in error in supposing, as they did, when the above decision was given, that £1 10*s.* per month was the amount of alimony which was invariably given in such cases, and had therefore proceeded on erroneous data in making the calculation of the amount of damages to be given, and quoted several cases in which only 15*s.*, £1, and £1 2*s.* 6*d.* per month had been awarded as alimony.

1837. Nov. 2. " 7. Ludekins vs. De Villiers.

The Court (the counsel for the plaintiff not objecting) reduced the amount of damages and alimony, and gave judgment for plaintiff for £55 as damages, inlying expenses, and bygone alimony, and £1 per month until the age of sixteen years, defendant to enter into a bond with sufficient security for the said monthly payments.

BOTHA, APPELLANT, *vs.* OLIVIER, RESPONDENT.

Rule of Court No. 13. *Resident Magistrate's Court Rules* 47 *and* 48.

Jurisdiction of Resident Magistrate as to title to land.

Nov. 28. Botha, Appellant, vs. Olivier, Respondent.

This was an appeal from a sentence of the Resident Magistrate of Worcester, by which he had awarded to the respondent £2 as damages for the injury sustained by him in consequence of appellant having wrongfully impounded certain cattle of respondent.

Brand objected that the respondent had only had seven days' notice to appear here to-day, instead of fourteen, which, as respondent resided in Worcester, he contended he was entitled to by virtue of the 13th Rule of Court.

But the Court, on reference to the 47th and 48th rules of the Resident Magistrate's Court, held that sufficient notice was all that was required to be given, and that in this case seven days' notice was sufficient, and overruled the objection.

The ground of the appeal was that the Magistrate had exceeded his jurisdiction, as the question at issue between the parties was as to whether the respondent had or had not a right of grazing his cattle on the ground where the cattle were impounded.

The majority of the Court held that the question which the Magistrate decided was one merely of fact, and not involving the title to any immovable property, nor any right of servitude or of any other kind; and affirmed the judgment with costs.

MENZIES, J., had some doubt whether there had not been a question of law at issue between the parties, which was decided by the judgment of the Magistrate, viz., as to the nature and extent of that right of pasturage which it was admitted the respondent had, to some extent or other, on some part or other of applicant's ground, which question depended solely on the legal construction of the deed by which that right of pasturage was constituted.

In Re Fairbairn *vs.* Chase.

Counsel. General retainer.

Where an advocate held a general retainer for F., and afterwards by oversight accepted a particular retainer in an action by C. against F., in which action there was a claim by C. in convention, and F. in reconvention, the advocate declined acting for either. Judgment was given in convention. F. asked the Court to assign him the said advocate in the claim in reconvention, which the Court declined to do, but intimated that there would be no impropriety, in the advocate's so acting if he chose.

1837. Dec. 12.

In re Fairbairn *vs.* Chase.

In this case, Fairbairn, stated that he had given a general retainer to the Attorney-General; that Chase had afterwards retained the Attorney-General in an action brought by him against Fairbairn, who, having forgotten Fairbairn's general retainer, accepted Chase's; but, being reminded of the general retainer, declined acting for either.

Fairbairn made a claim in reconvention against Chase, but the Court heard and decided on Chase's claim in convention, and postponed the trial and decision on Fairbairn's claim in reconvention.

Fairbairn now petitioned the Court to assign the Attorney-General as his counsel in the suit in reconvention, stating that the Attorney-General was willing to act if the Court thought he might do so without impropriety. Chase did not oppose the application.

The Court refused to assign the Attorney-General, but expressed an opinion that there would be no impropriety in his now acting for Fairbairn.

Jones *vs.* Rhynhout.

Where conditions of sale stipulated that purchasers neglecting to settle in a certain time would be liable to a charge of five per cent. for collection, and frequent demands by a collector were made, the Court allowed the charge. Affidavits allowed on appeal to show rejection of material evidence by a resident magistrate.

1838. Feb. 27. May 1. " 31.

Jones *vs.* Rhynhout.

This was an application for review of a sentence of the Resident Magistrate of Cape Town, given in an action in which Jones was plaintiff and Rhynhout defendant, by which the Magistrate had absolved the defendant from a charge of commission of five per cent. for collecting, the debt not having been paid within the stipulated period, notwith-

1838. Feb. 27. May 1. " 31.

Jones vs. Rhynhout.

standing that by the conditions of sale it had been stipulated that "purchasers neglecting to settle their accounts within three days after the sale will be liable to a charge of five per cent. for collecting, and the usual interest on the same, as also on all notes of hand or bills of exchange not paid on the day when become due. Payment must be made at the office on the Parade."

No appearance was made for the respondent.

It did not appear from the record that any demand or attempt to collect had been made.

On a suggestion that such evidence had been tendered and refused, the Court adjourned the further hearing of the case, in order that affidavits may be filed.

This day an affidavit by John Read Cozens was put in and read, which stated "that, in the capacity of collector of accounts for, and agent of the plaintiff, he, on the 17th January last, brought before the Court of the Resident Magistrate of Cape Town the action now under review. That, after the evidence of J. F. Geyer, the clerk of the said Jones, had been taken in said case, deponent tendered his oath that he had frequently presented the said account for payment to said Rhynhout, who had promised to pay the same, and also the commission of five per cent. for collecting; but the Magistrate refused to take the evidence of deponent, on the ground that deponent was an interested witness, inasmuch as the commission, if recovered, would go to and be paid to deponent for his sole use and benefit."

Thereupon the Court granted a rule on the Resident Magistrate and his clerk to show cause, on the 1st of May next, why they should not answer the matter of the said affidavit.

Postea (May 1, 1838).—After hearing the explanation of the grounds on which the Resident Magistrate had considered Cozens to be an interested witness,

Cur. adv. vult.

Postea (May 31, 1838).—The Court decided that, as the respondent had not appeared to object, or deny the allegations in the affidavit, and that as there could be no doubt that, if the case were remitted to the Resident Magistrate to take the evidence of Cozens, of whose incompetency, under all the circumstances, they entertained doubts, it would be proved by Cozens, or by reference to the oath of the respondent, that Cozens had repeatedly called on the respondent to collect the debt, they would, in order to save the expense of the remit, in deciding the case, hold that it had been

proved that the applicant's agent had made repeated calls to collect the debt; and, therefore, in conformity with the principle laid down in the case of *Smuts q.q., vs. Steytler*, 2nd December, 1833, they found that the plaintiff was entitled to claim out of the penalty a fair compensation for the expense he had been put to in attempting to obtain payment of his debt by means of his agent; and that, under all the circumstances of the case, the five per cent. claimed was not an unreasonable commission or compensation; and therefore gave judgment for the plaintiff in review for the additional amount claimed by him, viz., four shillings and four pence, being five per cent. on £4 7*s.*, the debt claimed; and condemned the defendant to pay all the costs in this case, as well in the inferior Court as of the proceedings in review.

1838.
Feb. 27.
May 1.
„ 31.
Jones *vs.* Rhynhout.

VERMAAK *vs.* CRUYWAGEN.

Resident Magistrate's non-jurisdiction for interest on bond, the validity of which is denied.

A resident magistrate has no jurisdiction to give judgment for a sum less than the amount to which his jurisdiction extends, but which is claimed as interest on a bond for a sum greater than the amount to which his jurisdiction extends, when the defence pleaded is a denial of the validity of the bond and bond debt.

Aug. 31.
Vermaak *vs.* Cruywagen.

THE QUEEN *vs.* JANTJE.

Criminal procedure. Warrant for infliction of lashes.

Where a prisoner was sentenced to lashes on a certain day, and by an omission no warrant was made out or applied for until the record was in the Supreme Court, the Supreme Court granted a warrant.

The prisoner had been sentenced by the Circuit Court to be imprisoned for two years, and to receive fifty lashes on the 8th October. By the omission of the Registrar of Circuit, no warrant for inflicting the lashes had been granted, nor had it been applied for until after the 8th October, and until after the record had in due form been removed into the Supreme Court. Thereafter, on the motion of the Attorney-General, the Supreme Court granted warrant for the infliction of the lashes forthwith.

Aug. 24.
The Queen *vs.* Jantje.

1838. Aug. 24. — The Queen vs. Jantje.

The same was done in another case, where the Deputy Sheriff had suffered the day appointed in the warrant for the infliction of the lashes to pass, without having caused them to be inflicted.

Borradaile *vs.* Mocke.

Post Contractor.

Common carrier, liability of post contractor as, for goods wrongly and unauthorizedly delivered.

1839. Aug. 30. — Borradaile vs. Mocke.

In this case, plaintiff sued defendant for £30, being the value of a certain gun and case, which in his declaration he alleged that defendant, as a common carrier, had undertaken, in consideration of a certain reward paid him by plaintiff, should be safely and securely carried and conveyed in defendant's post wagon from Stellenbosch to Cape Town, and there at Cape Town should be securely delivered by the said defendant to the said plaintiff, and that by and through the carelessness and negligence and improper conduct of defendant and his servants the said gun was lost to the said plaintiff.

In his plea, the defendant admitted plaintiff's allegations, save and except as follows, and alleged that he did cause the said gun and case to be safely and securely carried and conveyed to Cape Town, and that by the agreement and undertaking between the plaintiff and defendant it was covenanted and agreed upon between them, that said case and gun when so brought to Cape Town was "to be left at the defendant's till called for."

And that without any fault or neglect on the part of the defendant, he, the defendant, upon being thereunto requested, did deliver up said gun and case to the said plaintiff, or some person in behalf of said plaintiff; wherefore he prayed that the plaintiff's claim should be rejected, with costs.

After hearing the evidence produced by both parties, the Court held that it was proved that the gun case had been addressed :—

"Harry Borradaile, Esq.,

"Per wagon.

"To the care of Messrs. Borradaile, Thompson, and Pillans,

"Cape Town."

1839.
Aug. 30.

Borradaile *vs.* Mocke.

And that the address had not written on it the words "to be left till called for." That although these words had been on the address, the defendant had made himself liable for the gun and case by having delivered them to a person whom he had not proved to have been the servant of or employed, or sent for, the gun and case either by the plaintiff or his consignee, and to whom he had so delivered them without making any inquiry as to the person's authority to take them away, and gave judgment for plaintiff as prayed, with costs.

STADLER *vs.* MARSH.

Justice of the Peace. Ordinance No. 32, *sections* 5 *and* 6.

Notice of action against justices for acts done in execution of their office to be given at least one month before process is sued out. On failure of such notice, judgment to be given in favour of such justice.

1840.
Feb. 29.

Stadler *vs.* Marsh.

The plaintiff in this action claimed damages from defendant for assault and battery. His declaration set forth that the defendant, who was then a justice of the peace for the Cape district, &c., did make an assault on the plaintiff, and did without just or reasonable cause seize upon the plaintiff by the breast, and push and strike the plaintiff, and did threaten him, and put him in bodily fear by threatening him with a loaded pistol, which the defendant held in his hand, &c.

The defendant pleaded the general issue.

From the plaintiff's witnesses it appeared that defendant, as a justice of the peace, had sent a constable to arrest on a charge of theft, Parker, a servant of plaintiff, who had refused to go with or to be arrested by the constable, who then went away. That defendant then came on the same day to plaintiff's premises with the constable and an assistant, and that some violence had been used to Parker in endeavouring to arrest him, of which some one went and informed the plaintiff, who came and said to defendant, "If you want any man on my premises, why don't you come to me for him? I don't (or won't) allow any body to be ill used on my premises. "Defendant said, "Damn you and your premises! Do you dispute my authority?" Plaintiff said, "Don't damn me. I am a burgher, and in my own place." Defendant said, "If you interrupt me in my duty, I will take you too." Plaintiff said, wagging his fingers, "Oh no,

1840. Feb. 29. — Stadler vs. Marsh.

you know better than that; for if you do, you know it will cost you dear." Defendant then took hold of plaintiff by his collar, shirt and all. Defendant had in his right hand a stick, and also a pistol. Plaintiff turned round with a jerk as if to get loose, and defendant said, "I'll take you to Malmesbury (the seat of magistracy for the district); and then defendant said, "Armstrong (the constable), do your duty." Defendant let go plaintiff, and Armstrong then shifting his pistol from one hand to the other, took hold of plaintiff by the collar.

Thereupon the *Attorney-General* objected that it was now clearly proved that the act of defendant, upon which the action was grounded, was done as a justice of the peace, and therefore as no such notice of action had been given defendant as is required by the Ordinance No. 32, section 5, the plaintiff, by reason of the provisions of the section 6, cannot recover judgment against defendant, and quoted *Burn's Justice, Ed.* 1837, *p.* 586, 588; *Tidd, 1st vol., p.* 29; 24 *Geo. 2nd, c.* 44; 3 *Campbell, p.* 342.

Cloete argued *contra*, and quoted *Chitty on Pleading, vol.* 1, *p.* 272 *and note*, and maintained that what defendant had done could not be deemed to have been done as a justice, or in execution of his office of justice.

But the Court held the contrary, and gave judgment for defendant with full costs.

Melck, Executor of Burger, *vs.* David and Others.

Donatio remuneratoria.

A donation of land by a master to his servant by an unregistered deed declared effectual so as to bind the donor's executor to effect transfer in favour of the donatarius.

May 26. — Melck, Executor of Burger vs. David & Others.

This action was brought by the plaintiff, as executor of the deceased Burger, in order to have the two following deeds proved and declared to be null and void and of no effect on the following grounds:—First, that the deceased did not sign or execute said deeds, and did not know their contents or any part thereof; second, that at the time when the said deeds are dated the deceased was of unsound mind, and so infirm of intellect that at the dates thereof he was incapable to contract or bind himself, or to dispose of the property by will or bequest; third, that the said deeds were obtained by the defendants by fraud.

The defendants pleaded the general issue. The deeds were as follows:—

"On this 22nd February, 1837, before the witnesses whose names are subscribed hereto, personally appeared H. S. Burger, A.'s son, residing at Berg River, behind Piquetberg, in the district of the Cape. And this appearer, being of sound and disposing mind, memory, and understanding, as appeared at the execution of these presents, declared to have given and bequeathed, as by these presents he doth give and bequeath unto his apprentices (late slaves) named David, &c., in consideration of their long and faithful services, all his, the appearer's, farm or place called 'Goedverwachting,' situate at Piquetberg aforesaid, to be delivered over and transferred to them, or the survivors or survivor of them, by his executors, in full and free property, and upon equal shares and proportions, subject, however, to the following condition, viz., that they, the said David, &c., shall and do remain and continue in the service of him, the said H. S. Burger, and during the period of his natural life, and serve him faithfully in the same manner as they have hitherto done.

"As witness my hand the day and year aforesaid.

"H. S. BURGER, de Oude.

"As witnesses:

"W. F. HUGEMAN.
M. J. DU TOIT.
J. C. THEHART.
H. S. THEHART.
C. P. BOOMZAYER.
G. M. ROORNING.
P. J. M. BOOMZAYER."

"We, the first undersigned, David the Elder, Adam, David the Younger, Rachel, Eva, and Hester, late apprentices of H. S. Burger, of the field-cornetcy of Achter Piquetberg, in the Cape district, do hereby agree that if we shall so long live, we will remain by and continue with the said H. S. Burger until his death, and will during the whole of his life support and maintain him, and use our best efforts to render him comfortable.

"And I, the said H. S. Burger, being weak in body and of sound mind, in consideration of the services so to be performed and rendered to me, do hereby give, grant, and

1840. May 26. — Melck, Executor of Burger, vs. David & Others.

confirm unto the said David, &c., a piece of 910 morgen and 350 square roods of land, situate in the Cape district, field-cornetcy of Achter Piquetberg, including the loan place 'Goedverwachting,' more particularly described in the grant on perpetual quitrent in my favour bearing date 21st November, 1831, together with the buildings thereon, to be by them and the survivors or survivor of them, held and enjoyed for their own use and benefit, and after the death of all the parties to the first part, the said landed property to be sold and the proceeds divided to and amongst their children, in equal shares and proportions, share and share alike.

"And we, the first undersigned, do hereby accept and receive the said gift, of the said place, upon the conditions hereinbefore mentioned, and further agree to allow the said H. S. Burger to reside on the said estate so long as he may think fit.

"Witness our marks and signature at the aforesaid place this 18th April, 1838.

As witnesses:

"H. T. TOLKEN.	"ADAM.+
J. C. KOTZE (Field-cornet).	DAVID DE OUDE.+
B. J. LUCAS.	DAVID DE JONGE.+
D. J. LUCAS.	RACHEL.+
P. J. TRUTER.	EVA.+
W. J. VAN ZYL.	HESTER.+
W. J. VAN ZYL.	H. S. BURGER."
J. P. HUYSHAMER.	

No question was raised at the trial respecting the testamentary deed of the 22nd February, 1837, seeing that it was completely superseded and rendered useless by the deed of the 18th April, 1838, which, if valid and authentic, was a *de presenti* alienation by Burger of the land to defendants, in consideration of their stipulations entered into by them to him therein.

Field-cornet Kotzé, one of the witnesses to the deed, proved that he had seen Burger sign it, and Tolken, another of the attesting witnesses, pointed out and acknowledged the signature professing to be his, to be his signature.

Three other of the attesting witnesses swore that they had not seen Burger sign the deed or acknowledge his signature to it, and that they signed in consequence of a message said but not proved to have been sent them by him with the deed; but they all swore that they had heard him

profess his intention of giving the land to defendants, and speak of the deed which they had signed as that by which he had done it. It was proved that Burger told several of the witnesses that he had sent to Cape Town to get the deed (which was in the handwriting of a clerk of Merrington and Sturgis, who had prepared it by direction of the younger Mr. Merrington) prepared, and had described the deed when showing it as being the deed he had got from Cape Town. It was in English, but one witness swore he read it over and translated it to Burger, and then saw him and the attesting witness Kotzé, immediately after it was so translated, sign it.

It was proved that at the time Burger signed the deed he was of sound mind.

No evidence was led to show any fraud or circumvention on the part of the defendants, and it was proved that Burger's children and relations had all left or deserted him, and that defendants not only previously, but also subsequently to the execution of the deed, and until his death, treated the old man with great kindness, attention, and care.

The Court held the deed to be valid and effectual in law, and gave judgment for defendants, with costs.*

No suspicion attached to the deed in consequence of several of the attesting witnesses having signed it without having seen Burger write or heard him acknowledge his signature; the people in the country districts being so ignorant both of the law and of the principles on which the signatures of attesting witnesses to deeds are required, that there is the strongest reason to believe that no one deed executed in the country districts, requiring to its validity the signature of seven attesting witnesses, had for a very long period of years ever been duly executed by the whole, or even the majority, of the seven attesting witnesses who had signed it having actually seen the maker write or heard him acknowledge his signature.

[In consequence of this *communis error*, it was deemed necessary to pass the Ordinance No. 4, 1843, which was again amended by the present Ordinance No. 15 of 1845.]

* Note.—It is clear that if the estate had been found by the executor to be insolvent, the property would have been in the estate, and liable to sale for the benefit of creditors. No tradition had been given by the testator, but only the right to claim tradition.

HARE *vs.* KOTZÉ.

Assault, civil action for, competent after criminal conviction.

1840. Aug. 31. — Hare vs. Kotzé.

The plaintiff in this case had, on the 14th May, 1840, been prosecuted by the Clerk of the Peace in the Court of the Resident Magistrate of Wynberg for an assault committed by him on the defendant, and by the said Court convicted thereof, and sentenced to pay a fine of £5.

The plaintiff had thereupon brought a civil action in the same Court against the defendant, in which he claimed £10 damages in consequence of the defendant having assaulted him with a gun.

The defendant took the exception of *res judicata*, on the ground that the case had already been tried and decided in the said Court in the above criminal action, and referred to the evidence given in that case by the two witnesses now produced by plaintiff in this action, to show that the subject matter of both actions was the same.

The Resident Magistrate sustained the exception, and dismissed the case, with costs.

On review, the Court this day reversed the sentence of the Resident Magistrate, with costs, and remitted the case to the Resident Magistrate, to proceed therein according to law.

THIBART *vs.* THIBART.

Interest is due from the day of payment specified in an instrument of debt, although no demand has been made, and although the instrument does not stipulate for interest.

Nov. 30. — Thibart vs. Thibart.

In this case, a doubt was raised, as to whether interest was due from the day of payment specified in the instrument, although no demand had been made, and although the instrument did not stipulate for interest.

The Court, after considering the authorities, *Voet*, 22, 1, 26, and *Van der Linden's Inst., p.* 218, "*Dies interpellat pro homine*," found that it was due.

BARRY *vs.* BARNES AND NEEDHAM.

Provisional sentence. Cession.

Provisional sentence granted to the cessionary of a liquid obligation without notice to defendant of such cession being required.

1841. March 12.

Barry vs. Barnes and Needham.

The Court held that a liquid obligation for money payable on 15th February, 1841, in favour of Barry or order, having been ceded by him to Reitz, Breda, & Co., on 28th July, 1840, and by them to plaintiff on 19th February, 1841, the last cession was sufficient to warrant the issue of a summons for provisional sentence on the 19th February, 1841, although no notice of this cession had previously been made to the debtor; and that, as no tender of the amount had since been made by defendants, plaintiff was entitled to provisional sentence with costs, which they gave accordingly.

Defendants did not appear.

SHAND *vs.* DE WAAL.

Dutch Reformed Church Case.

Action by minister against a churchwarden for delivery up of the parsonage key. Minister, and not consistory, held entitled to possession of parsonage and key.

May 18.

Shand vs. De Waal.

In his declaration, the plaintiff, in his capacity of minister of the Reformed Dutch Church at Tulbagh, alleged that the parsonage-house at Tulbagh had, in the year 1800, been erected by the congregation of the said church as a residence for the minister thereof, on a piece of ground belonging to Government, with the privity and permission of the Government, and has, with its appurtenances and premises, been always by virtue, amongst other things, of the leave, licence, and permission of Government, been lawfully possessed and enjoyed by the said minister for the time being without let and hindrance; that immediately after his appointment as minister on 10th September, 1835, the key of the said house was given to plaintiff by his immediate predecessor; that the plaintiff, not desiring to occupy the said house for some time, he caused the said key to be, on the 20th February, 1836, delivered to the defendant, then being the only acting elder of the said church, in order that

1841. May 18. — Shand vs. De Waal.

defendant might hold possession of said house and premises for plaintiff, until plaintiff should choose to reside therein; that plaintiff was suspended from his office of minister as aforesaid by the presbytery of Swellendam on 14th March, 1836, which suspension was on the 7th December, 1838, removed by the Synod of the Dutch Reformed Church, and he was then restored to the full possession of all his former rights and privileges as such minister aforesaid. That plaintiff on the 7th March, 1839, and thereafter, caused repeated applications to be made to defendant to return the said key, and yield up possession of said house and premises to plaintiff, as such minister aforesaid, which the defendant, without any legal or equitable ground, refused to do, and still retained possession of the said key, house, and premises, and since the demand aforesaid had sold certain produce of the said premises to the amount of £100, which he had not in any way accounted to the said plaintiff. Wherefore the plaintiff prayed that the defendant be decreed to give up possession of the said house and premises with the appurtenances to the plaintiff as such minister aforesaid, and to pay to said plaintiff £200 as his said damages, and furthermore the costs of suit, or that the plaintiff may have such other relief as to this Court shall seem meet.

In his plea, the defendant admitted the plaintiff's appointment,—suspension,—the removal of the suspension,—the delivery on the 20th February, 1836, of the keys of the said house in the name of, and as from, the plaintiff to the defendant, then being an elder of the said church of Tulbagh, —and the plaintiff's demand on defendant to return to him the keys of the said house and premises; and denied every other allegation of the plaintiff.

And for special plea, alleged that the said house and premises were acquired by means of funds contributed by the said congregation or community, which funds were placed under the charge and control of the churchwardens of the said church to be by them held in trust for the behalf of the said congregation; and that they, the churchwardens, did expend the said funds in the erection of the said premises, and upon lands being also the property of the churchwardens for the time being; and that on the 20th February, 1836, the defendant then being one of the elders and churchwardens of said church, the plaintiff caused the said keys to be delivered to the defendant in such his capacity, to be held in trust for the churchwardens for the time being on behalf of the said congregation. And that on the 7th February, 1839, when the plaintiff applied to defendant to deliver up to him the said keys, the plaintiff was not a member of the board of churchwardens of the said church legally

appointed according to the existing laws and customs of the Dutch Reformed Church, and that the defendant was bound and entitled to withhold the delivery of the said keys which had so been entrusted to him until an application shall have been made to him by or on behalf of the said board of churchwardens, who of right are alone entitled to the possession, control, and superintendence of the said premises.

On the trial, the plaintiff called Abraham Faure:—I am senior minister of the Dutch Reformed Church in Cape Town. I keep the archives and records of the Synod of the Reformed Church, of which Synod I am a member. I have been a minister in this Colony since July, 1818. When a minister is appointed to a church, he goes to the village, and the custom is that he receives the keys of the parsonage from the churchwardens, or sexton, or landdrost. Every parish has its consistory, consisting of two or three elders, and four or five deacons, of which consistory the minister is the president. The minister has a vote, and is the executive of the consistory, that is, he causes the resolutions of the consistory to be carried into execution. He is also the convener of the consistory; he may convene a meeting at any time, but I consider he cannot be forced to call a meeting. In my experience I know of no instance of a consistory exercising any right or control over the parsonage, except making repairs or alterations, which may be necessary, or which may be proposed by the minister. One of the consistory is usually appointed *Kerkmeester*, *i.e.*, churchwarden or superintendent of the buildings. The regulations respecting the election of churchwardens form part of the constitution of the Dutch Reformed Church. I produce a printed copy of the laws of the Dutch Reformed Church partly printed in 1825, 1829, 1831, 1834, and 1839. These do not include the regulations of Commissary De Mist, which were printed in 1804. All the regulations in this book have been made and approved by the competent authorities in the Church and of the State, and they constitute the government and discipline of the Dutch Reformed Church in this Colony. The 23rd article of De Mist's Instructions provides that the consistory shall be elected according to the provisions of the regulations of the Synod of Dort. A meeting of consistory cannot be held while the minister exists, and is mentally capable of executing his duty, except called by him. This is my understanding; I cannot quote a law for it. In the event of the ministry being vacant, the senior elder may convene a meeting of the consistory. Where the minister is mentally incapable of acting, the presbytery

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interfere. This power was given the presbytery in 1837. When a new parish is erected, the first consistory is formed by the presbytery. Half the members of the consistory go out of office every year. The election is by the votes of those who have previously filled the office of elder and deacon, by the regulations of 1837. If a clergyman fails to call a meeting when he ought to do so for the purpose of having an election of members of consistory, the remedy of the congregation is by an application to the presbytery. A consistory cannot suspend a clergyman from preaching, or the exercise of any of his duties. The presbytery could first order the minister, under pain of church censures, to call a meeting for election; and if he was contumacious, the presbytery would themselves do it. The special regulations Nos. 17, 18, and 19 passed, in November, 1837, regulate the election, &c., of the consistory since 1837. The consistory are the trustees who hold the church, the parsonage, the sexton's house, and other buildings for the purposes for which those buildings are specially destined, and these buildings are so far under the control of the consistory that the minister could not make alterations in the fabric of these without the consent of the consistory. The parsonage of Stellenbosch was sold by the consistory and the minister, according to the regulations of De Mist, with the consent of Government, and the proceeds were placed out at interest, which interest this consistory paid to the minister as house-rent, till they could purchase a house for a parsonage, when this house was delivered over to the minister. The ministers of the Reformed Church are all appointed by Government, and not by the congregation or consistory; but in Holland, some by the consistory, some by the male communicants, and some by the congregation, subject to the royal veto.

Albert Nicholas Wiepenaar:—I am an auctioneer, and live at Tulbagh. I know defendant. I know the parsonage house. There is a piece of land, about an acre or more, attached to the parsonage. In 1839, there was a quantity of wild oats on this piece of ground, which defendant asked me to sell by auction. I sold it for Rds. 195, which I paid over to the defendant under deduction of the usual percentage, and defendant signed a receipt for it. In 1836, I gave a rent of Rds. 155 for part of this ground, which I hired from the consistory. This was in the time of Dr. Thom, but he was not then resident or capable of managing his affairs. This ground comes up to the back building of the parsonage. I think the parsonage house and land is worth £75 a year for a three years' lease, or even for one year. I would give for one year £50 for the house

alone. Since the suspension was removed, plaintiff lived one year at Mr. Keet's, and after that he hired Mr. Vos's house, furnished, where he still lives. Defendant ordered me to sell the oats on account of the church fund.

Plaintiff put in a letter dated 25th March, 1837, addressed by the Secretary to Government to plaintiff, informing him as to certain arrangements which were to have effect during his suspension, and containing the following passage :—"You retaining possession of the parsonage house and premises belonging thereto during your suspension."

And the following letter, dated 28th November, 1839, from the Secretary to Government to Messrs. Moller, Theron, Marais, and Retief, late elders and deacons :—

"Colonial Office,

"Cape Town, 22nd Nov., 1839.

"GENTLEMEN,—I am directed by the Governor to acknowledge the presentation yesterday of your memorial, dated the 18th instant, and to inform you once more, that if an exchange can be procured for the Rev. Mr. Shand, he will be exceedingly glad to promote it; but even were his Excellency to consent to Mr. Shand's retirement on his full salary, an arrangement in which that gentleman's concurrence could not be looked for, it would still be impossible for him, as Governor, to take any part in the appointment of a successor to be paid by the private contributions of the people.

"Aware that the use of the parsonage house has been denied to Mr. Shand, who is lawfully the minister of Tulbagh, His Excellency the Governor has declined interfering in that question upon that gentleman's representation; but he cannot avoid observing that such a proceeding on the part of those in power does not by any means strengthen their case.

"I have the honour, &c.,

"JOHN BELL."

The *Attorney-General* also put in a notarial notice served upon the defendant demanding the key, dated June, 1839; to which an answer had been returned. "Mr. Shand must address himself about that matter to the *Kerkenraad*."

He then further read the 25th and 37th articles of Commissary-General De Mist's Church Regulations, by which the fixed salaries of ministers are regulated in this Colony; and, to prove that the ground on which the church was built belonged to Government, called

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Pieter Meiring,—I am a land surveyor. I recollect having been called upon to make a survey of the grounds attached to the parsonage at Tulbagh, I think in 1836. I had surveyed all the land round the parsonage about twenty years ago by order of the Landdrost Fisher, and in 1826, at the request of the churchwardens, I went back to point out the landmarks, because the diagrams had been lost. I accordingly pointed out the beacons to the consistory, and drew out and delivered to them a fresh diagram, of which I have here a rough outline. I know the diagram now shown to me, of ground between the parsonage and the church. No part of the parsonage ground was included in those diagrams. My first survey included the whole village, including 390 morgen of government ground, which it was contemplated should be granted to the consistory. It was land taken of the adjoining loan places and reserved for the church. I produce a general survey of the village, in which I have laid down the different pieces of ground laid down in the diagram now shown me, and which show that the parsonage and parsonage ground are not situated in any of these pieces of ground. When I made the first survey by direction of Landdrost Fisher, I could not find any beacons defining the pieces of ground contained in those diagrams.

The plaintiff closed his case.

Cloete, for the defendant, took an objection to the plaintiff's right to sue him for the key of the premises, on the ground that the administration of the church property was, by the 37th article of De Mist, vested in the consistory and placed under their charge, and that the consistory alone can sue.

The Court held, that as the case now stood, defendant had not sufficient ground on which to maintain the objection, and directed him to proceed with the evidence for the defence.

Marthinus Lotter called:—I am sexton of the Dutch Reformed Church at Tulbagh; I have been since 16th May, 1838. In December 1838, one Monday morning, Mr. Shand requested me to go to defendant and ask for the key, as he wanted to catechize the children. I took the message to defendant, who said, "Mr. Shand may have the key and use the left-hand room." I repeated this to Mr. Shand, and he said, "It is well." I did not take the key to Mr. Shand, as I had only been told by Mr. Shand to ask if he could get the key. He gave me no further message respecting the key. In 1839 he gave me a direction in writing to ask for the key. I got a verbal reply at the moment. It is not in my power alone to give up the key. On the 7th November I took a

letter to defendant and the old churchwardens, to which I got a letter in reply. (Letter and answer read.) Mr. Shand was aware that that letter was given to me; he was present in the vestry when it was given. The letter is signed by Messrs. Nieuhuis and Du Plessis, who subscribe themselves elders of Tulbagh. I believe they were appointed 12th April, 1840. They were not elders or deacons of the church before.

Cloete read the following letters, which were produced by Cornelius Klerck, called for the purpose:

"Tulbagh, 9th January, 1839.

"Rev. Gentlemen Churchwardens, and Messrs. De Waal and Klerck.

"It is well known to you that the most part of our congregation will not receive the Rev. Mr. Shand as their minister. We are therefore in doubt whether we shall deliver up the parsonage to his reverence; inasmuch as it is the property of the congregation, as it had been of their forefathers. Therefore we request you not to comply at present.

"We are, Gentlemen,

"Your most obedient servants,

"P. F. THERON, Sen., Elder.
P. J. THERON, Deacon.
T. J. MARAIS, do.
H. S. COENRADIE, do.
J. W. THERON, do.
H. F. MOLLER, do.
P. Z. THERON, do.
D. RETIEF, do.
J. DE BRUYN, Elder.
D. J. THERON, Deacon."

"Tulbagh, 1st July, 1839.

"To the Rev. the Churchwardens of Tulbagh.

"REV. GENTLEMEN,—Whereas we requested you some time ago not to give up the parsonage to the Rev. Mr. Shand, as in consequence of his conduct, and the manner he treated us, we cannot receive him as our minister; being informed that the Rev. Mr. Shand has requested Mr. De Waal, the

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elder, through a notary public, to deliver up the key of the parsonage, which we consider to be the property of the congregation, it is our wish and desire that the key should not be given up.

"We have the honour to be,

"Reverend gentlemen,

"Your most obedient servants,"

(Names as above.)

The witness on cross-examination said:—I was a member of the consistory. I recollect getting a notice to meet and elect a new consistory. None of us went. Defendant and the whole consistory got the notice. We did not go because we did not like to meet Mr. Shand, having already given in our complaint to the Governor. It was after the old consistory declined to attend that the presbytery appointed a new consistory.

Cloete put in certain documents setting forth the cash account of the funds of the church for the year in which the church was established, to show that they were appropriated for the erection of the parsonage as well as the church. It appeared that in 1733 a small building had been erected as a parsonage, and as the church funds improved, the present substantial edifice was built. He also put in a mortgage bond bearing date 1769.

Defendant closed his case.

Counsel having been heard, the Court were unanimous: 1st. That plaintiff was entitled to the possession of the parsonage, and consequently of the key, and that the consistory had no right to recall or retain possession of it from him; 2nd. That as, in the present action, there was no evidence of defendant having had, or trying to keep, any other possession of the parsonage except the key, the judgment of the Court could only be given to the effect of compelling him to give up the key, and would have no effect against the consistory or any other person who might have obtained possession of the parsonage; 3rd. That the only question remaining for decision was, whether the defendant held possession of the key under such circumstances as entitled the plaintiff to sue him individually, in which case plaintiff would be entitled to judgment against defendant, for re-delivery of the key; or whether, as alleged in the plea, plaintiff had delivered the key to him as trustee for the consistory, and could, therefore, only recover the key by an action against the consistory, or at least, by an action against the defendant, after having obtained an order from

the consistory directing defendant to give up the key to plaintiff; in which case this action must be dismissed as having been brought against the wrong party, or, at least, without the plaintiff having clothed himself with a sufficient title (viz., an order from the legal consistory for re-delivery to him of the key). It was evident that, if judgment were given in this action for the defendant, the plaintiff would be compelled to adopt one of two courses: either he would obtain from the consistory appointed by the presbytery an order on defendant to deliver him the key, and having obtained this order, sue the defendant for delivery of the key, against whom he would obtain judgment, unless defendant did—as it was most probable he would do—deny that the consistory was the legal one; in which case it would become necessary for this Court, in order to explerate their jurisdiction, to try and decide the legality of the presbytery's appointment,—a question more proper for the decision of the Ecclesiastical Court, and on which the Ecclesiastical Court might give a different decision from that of the Supreme Court, which would be very inconvenient, and would occasion much confusion and perplexity. If, therefore, the plaintiff were compelled to adopt this course, much and vexatious litigation would be created; and if the Court should decide that the consistory appointed by the presbytery was not legally appointed, the plaintiff should still be under the necessity of adopting the other alternative course of proceeding, and of bringing an action against the surviving members of the last legally elected consistory, as being the existing legal consistory (by which the plaintiff would be obliged to disclaim the authority and the validity of the proceedings of the presbytery, and thus be placed in a very awkward predicament), to compel those members to deliver, or cause to be delivered to him, the key of the parsonage. In which action he would recover judgment.

The Court having explained the above views taken by them of the case, and of the consequences likely to arise,—an arrangement took place between the parties by which plaintiff consented to withdraw his claim for damages, and defendant consented to judgment being given against him, to deliver the key to plaintiff within one week, and to pay him £14 5*s.* 6*d.*, which he had received as the price of the plaintiff's wild oats, under deduction of the expense of cutting them, &c.; and each party to pay his own costs.

Judgment was given accordingly.

Wylde, C.J., held that the defendant had got and held the key in trust for the consistory, and, therefore, that plaintiff was not entitled to sue defendant in his individual capacity

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for the delivery of the key, and ought to have proceeded against the consistory, or, at least, have first obtained an order from the consistory on defendant to deliver the key.

MENZIES, J., held that, under the circumstances of the case, as disclosed by the evidence, the defendant must be considered to have received, and to hold, the key as a deposit made by plaintiff for his own behoof; and that even if it could be held that plaintiff had given the defendant the key in trust for the consistory, this trust could only be held to have been constituted to endure during the plaintiff's suspension; and, therefore, that in these views plaintiff was now entitled to bring this action against defendant in the form in which it had been brought, and was entitled to judgment against defendant.

KEKEWICH, J., in consequence of the desire anxiously expressed by the plaintiff's counsel that this case should be terminated by an amicable arrangement rather than by a judgment in his favour, did not express his opinion until after the parties had made the above arrangement, and judgment had been given, when he entirely concurred in the opinion of MENZIES, J.

CLERK OF THE PEACE OF COLESBERG *vs.* ENSLIN.

Wine and Spirit Ordinance, No. 94, § 4. *Onus probandi.*

In a prosecution under the Wine and Spirit Ordinance for the sale, without licence, of brandy not being the produce of the seller's lands, nor made from grapes otherwise procured or purchased by him, the onus probandi those facts rests on the defendant, and not on the prosecutor.

Evidence of the contravention of Ordinance 93 *cannot support a charge of contravening Ordinance* 94, § 4.

May 20. — Clerk of the Peace of Colesberg vs. Enslin.

The defendant was prosecuted before the Resident Magistrate of Colesberg "for contravening the fourth article of the Ordinance 94, by selling brandy on the public market at Colesberg, the same not being the produce of his lands or made from grapes otherwise procured or purchased by him."

The sale of the brandy on the market in a greater quantity than nine and a half gallons at one time was proved. Defendant admitted he had no licence, but objected that plaintiff could not recover the penalty sued for unless he proved that the brandy sold was not the produce of defendant's farm or of grapes purchased by defendant and made into brandy on his place. Plaintiff maintained that the *onus probandi* that

the brandy was the produce of defendant's farm, or of grapes purchased by him and made into brandy on his place, lay on the defendant. The Magistrate repelled the objection. Defendant then proved that he had a farm and a large vineyard at the Paarl, but had no evidence that the brandy in question was the produce of or made on that farm.

Sentence: guilty.

The sentence was brought under review of the Circuit Court, by which the case was removed to the Supreme Court. After hearing parties, the Court held that the Magistrate had done right in deciding that the *onus probandi* that the brandy was the produce of or made on defendant's farm lay on him, and that the prosecutor was not bound to prove the contrary, but quashed the sentence on the ground that, if the brandy was the produce of or made on defendant's farm, then as he had sold it on the market in a larger quantity than nine and a half gallons, he had not contravened the fourth section of Ordinance 94, and on the other hand, that if the brandy was not the produce of or made on his farm, then the defendant, by selling it without a licence, although he may have contravened the Ordinance No. 93, had not thereby contravened the fourth section of Ordinance No. 94, on which alone the charge was laid, because that clause applies exclusively to sales of wine or brandy the produce of or made on the farm of the seller, and does not impose any penalty either expressly or by reference to the Ordinance No. 93 for selling without a licence brandy not being the produce of or made on the farm of the seller.

The Court held that a tender made to the Sheriff's officer when he was serving the summons was not a sufficient legal tender to bar the plaintiff's claim for costs, and gave provisional sentence with costs.

LAWTON *vs.* RENS.

Fraud, action of damages for.

Res judicata, exception of Judgment, relief against on the ground of error.

L., on the strength of certain fraudulent misrepresentations made to him by R. as to the means and credit of De K. and M., sold to them certain flour, part cash, part bills. M. surrendered. De K. being sued on the first of the bills, judgment and execution went against him, resulting

in an insufficient levy. L. then brought an action of damages against R., tendering cession to him of his rights against De K. and M.'s estate, for the amount of all the bills arrived at maturity and unpaid, which he had supposed to be £600, *but which in reality only amounted to* £575 11*s.* 9*d. The Court held that it was competent for R., on tender of full cession, to have claimed as damages the amount of a bill for* £90 *not matured at date of action; and in giving judgment for the full* £600, *apportioned the* £24 8*s.* 3*d. difference between the two amounts of* £600 *and* £575 11*s.* 9*d. to a part payment of the* £90 *bill.*

Thereafter L. brought a second action for the balance of the £90 *note, on the ground that, if the judgment of the Court was a satisfaction in full of all the damage he had sustained, then there had been such an error on his part in framing his first action, and excluding the unmatured bill, as entitled him to pray relief against such judgment, and to sue for the balance of the* £90 *bill, and for interest on the bills generally. Defendant excepted res judicata.* HELD, *that the exception was otherwise well pleaded; but that the plaintiff was entitled, in the opinion of the Court, to relief against the first judgment on the ground of error.*

1842.
May 3.
Aug. 25.
Nov. 24.
1843.
Feb. 7.
1842.
May 10.

Lawton vs. Rens.

This was an action to recover a sum of £600, as the amount of damages which the plaintiff had sustained by reason of fraud and deceit on the part of the defendant.

The declaration of the plaintiff set forth, in effect, that he, Mr. Thomas Lawton, having then a large quantity of flour for sale, was applied to in September last, relative to the purchase of 700 barrels of it by one Mr. Christiaan de Kock, who proposed to pay £400 in cash, provided the balance, £790, were allowed to remain on credit; and further stated that one Mr. Cornelis Mostert would, conjointly with him, become a purchaser of the flour, and would, as such joint purchaser, become a party to the bills which might be passed for securing the amount so proposed to be taken on credit. At this time plaintiff was unacquainted with the circumstances of De Kock, and while this offer was under his consideration, the defendant—who (as the plaintiff has since discovered) was then in some clandestine manner connected with, and interested in, the baking business carried on by the said De Kock—contriving and fraudulently intending to deceive and injure the plaintiff in regard to the sale of the said flour, falsely represented and affirmed both to him and one George Walker, his agent, that De Kock might safely be trusted

by the said plaintiff with the sum of £790 on credit; that he owed him (the defendant) nothing; and that he had a good deal of money of his own; and, further, that plaintiff might rely upon it, that the bills to be passed by De Kock and Mostert would be punctually paid when at maturity. By means and in consequence of which representations and affirmations, the plaintiff, not knowing the contrary, but believing that he might safely sell and deliver flour to these parties, was induced to give them credit to the amount of £790, taking five bills drawn by De Kock upon Mostert, and accepted by the latter. "But the said plaintiff saith that, in truth and in fact, the said defendant did not believe that the said Christiaan de Kock could be so trusted; and that in truth and in fact the said Christiaan de Kock, at the time of the making of the said representations and affirmations, did owe to the said defendant a certain large debt or sum of money, the particulars whereof being a matter peculiarly within the knowledge of the said defendant, the said plaintiff is unable to set forth; and that, in truth and in fact, the said defendant well knew that the said Christiaan de Kock did owe to him, the said defendant, the said debt or sum of money; that, in truth and in fact, the said defendant, at the time of the making of the said representations and affirmations, did not believe that the bills aforesaid, to be passed to the said plaintiff by the said Christiaan de Kock and the said Cornelis Mostert, would be punctually paid when at maturity; and that, in truth and in fact, the said representations and affirmations were made and given by the said defendant through cunning and contrivance, in order to circumvent and injure the said plaintiff in the premises." The declaration further stated, that Mostert had since surrendered his estate as insolvent; that De Kock had not paid any of the bills when they became due; that plaintiff had obtained provisional sentence against De Kock for £300, being the amount of the two first bills, on which an execution was issued, when all that could be levied was £134; that the bill which had not reached maturity was likely to be left wholly due and unpaid; and that the plaintiff, by means of the defendant's false and deceitful representations and affirmations, was thus likely to lose the whole of the £790 and costs of the provisional sentence, except the sum of £134 so levied as aforesaid, and whatever dividend the insolvent estate of Mostert might hereafter pay.

Wherefore plaintiff prayed that the defendant might be condemned by this honourable Court to pay to him the sum of £600 damages, with costs of suit,—offering to cede to defendant all claim in respect of the bills above referred to.

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The defendant, for plea, denied every allegation in the plaintiff's declaration set forth, and joined issue with him thereon.

After the examination of the witnesses adduced by both parties, *Cloete*, for defendant, quoted *ff* 4, 3, 7, § 10; *Voet* 4, 3, 13; *Pothier* on annulling contracts on the ground of fraud; and maintained that what was proved by the evidence to have been done by defendant was not of such a nature as to render him liable to an action for fraud.

The Court, in giving judgment, stated that the evidence had convinced them that the defendant, whose debtors De Kock and Mostert were, for several hundred pounds each, had formed a deliberate and fraudulent scheme of getting into his possession, by the instrumentality of De Kock and Mostert, and by means of a purchase to be effected by them, 700 barrels of flour, worth upwards of £1,100, which the plaintiff had offered for sale,—of the price of which they were only to pay, on delivery, one-third, or £400 in cash, which the defendant was to advance them, and obtain credit from the plaintiff for the balance, by giving him bills for the amount; and of then applying the proceeds of the whole of this flour, first to the repayment of the £400 cash advanced by him, and then to the payment of the debts due to him by De Kock and Mostert; leaving to plaintiff no other security for the balance, for which he was to give credit to De Kock and Mostert, than these bills, which he (defendant) well knew they had not the means of paying when due.

That the defendant, by wilful and deliberate misrepresentations made by him to Mr. Walker, the plaintiff's agent, and afterwards to plaintiff, and by a series of fraudulent and deceitful contrivances, had succeeded in inducing plaintiff to sell the flour to De Kock and Mostert on the above terms, and to deliver it to them on getting a payment of £400 in cash, and these bills for the balance,—and in obtaining possession of the whole of the said flour, except a few barrels. And that he had appropriated the proceeds of a large portion of the flour of which he had so obtained possession to his own use, and had attempted so to appropriate the remainder.

Judgment for plaintiff for £600 and costs, to be taxed as between client and attorney. Plaintiff to make cession to defendant, as tendered in the declaration.

The Court held that it was competent for plaintiff to claim, as part of the damages sustained by him, the amount of the bill described in the declaration as not having reached maturity when the declaration was filed, as he tendered cession of that bill to defendant, and would, in estimating

the amount of damages, have included the full amount of that bill, if plaintiff had not limited his claim for damages to £600, and thus precluded the Court from awarding more than £600 in this action. But to the extent of £24 8s. 3d. damages were awarded by the Court in respect of this bill, which is thus proved. The total amount of plaintiff's loss, excluding this bill, was £700, is which he had recovered

from De Kock	£134	2	8
Less his costs	9	14	5
	£124	8	3
	£700	0	0
	124	8	3
	£575	11	9
	24	8	3
	£600	0	0

So that the amount due to plaintiff, excluding the last bill for £90, was £575 11s. 9d., while the damages awarded were £600; so that the balance of £24 8s. 3d. was awarded by the Court in respect of said last mentioned bills.

Postea (25th August, 1842.—The plaintiff brought a second action against defendant for the sum of £65 11s. 9d.; being the balance of the damages sustained by him by means of the fraud committed by defendant, on which the former action was founded, not included in the £600 awarded by the Court as damages in that action.

In his declaration in the second action, plaintiff, after alleging the same facts set forth in the declaration in the former action, further averred:

"That he commenced, on or about the 24th day of March, 1842, an action against the said defendant, to recover damages against the said defendant for his fraud and deceit in the premises, in which action the said plaintiff claimed the sum of £600 as the amount of the damages by him sustained at the the time of the filing of his declaration in the said cause; that at the time of the filing of the said declaration the bill aforesaid, due upon the 20th April, 1842, had not reached maturity and was not included in the estimate of damage upon which the sum of £600 so claimed as aforesaid was founded. And that in the said action such proceedings were duly had and taken. That on or about the 5th day of May last, this honourable Court gave judgment against the said defendant in favour of the said plaintiff for the said sum of

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£600, together with the costs of suit, the said plaintiff being condemned to cede to the said defendant all claims and demands which he might otherwise have had against the said Christiaan de Kock and the insolvent estate of the said Cornelis Mostert; and that if it shall appear to this honourable Court that the declaration and claim of the said plaintiff in the said action is so framed as to make the judgment pronounced as aforesaid by this honourable Court, for the sum claimed therein, a presumptive satisfaction of all the damages sustained by the said plaintiff by reason of the fraud and deceit of the said defendant as aforesaid, the said declaration and claim was so framed through mere error and mistake, and upon the supposition that damages should be demanded thereon only sufficient to cover the amount of such of the bills aforesaid as were at the time of the filing of the same actually due and unpaid, and that the amount of the said bill of £90, to become due as aforesaid upon the 20th April, 1842, could not properly be included in the amount demanded by the said action. And the said plaintiff saith that he is willing to allow to the defendant the sum of £24 8s. 3d., being the difference between the sum of £600 so adjudged as aforesaid to the said plaintiff and the sum of £575 11s. 9d., the amount of the different bills aforesaid (exclusive of the said bill of £90), after giving credit to the said defendant for the sum of £134 2s. 8d. as aforesaid, recovered in execution as aforesaid from the said Christiaan de Kock, less the sum of £9 14s. 5d., being the cost of suit aforesaid; and the said plaintiff limits his claim for damages in this action to the amount of the said bill of £90, less the said sum of £24 8s. 3d., that is to say, the sum of £65 11s. 9d., together with such interest upon the various bills aforesaid as the said plaintiff is justly entitled to receive. Wherefore the said plaintiff prays that the said defendant may be condemned by this honourable Court to pay to the said plaintiff the said sum of £65 11s. 9d., together with such interest as is last mentioned, as the damages still justly and equitably due and owing to the said plaintiff by reason of the fraud and deceit aforesaid of the said defendant. And the said plaintiff also prays that he may, if necessary, be relieved by this honourable Court from the operation of the aforesaid judgment of the 5th May, 1842, so far as the same might in any manner bar or foreclose him from maintaining his present action, due proof being made by the said plaintiff that his claiming in the said action, in which the said judgment was pronounced, inadequate damages, arose from mere error and mistake. And the said plaintiff prays that the said defendant may be condemned to pay the costs of this suit.

In the defendant's exception and plea, the defendant pleaded that the plaintiff ought not to have and maintain his aforesaid action, in manner and form as by him has been complained of, for the defendant saith (without answering the several facts and allegations in the said declaration contained) that, on or about the 24th day of March, 1842, the said plaintiff brought an action against the said defendant for a sum of £600, as alleged damages, by reason of the fraud and deceit of the said defendant relative to the purchase from the said plaintiff of seven hundred barrels of flour at Cape Town on the 20th September, 1841.

And the said defendant further saith, that such action was tried by this honourable Court on or about the 5th day of May, 1842, and that the plaintiff recovered judgment against the said defendant for the sum of £600 as damages then alleged to have been due to the plaintiff by reason of the fraud and deceit of the said defendant in the matter aforesaid.

And the defendant further saith that the said defendant has satisfied said judgment, or caused the same to be satisfied, and that it is not competent for the said plaintiff to sue the said defendant for damages now alleged to have been sustained by the plaintiff by reason of the aforesaid fraud and deceit, that cause of action having been tried by this honourable Court as aforesaid, and the damages as then alleged by the plaintiff thereon having been fully satisfied by the said defendant, or on his behalf.

And upon these grounds the said defendant proposes the exception *rei judicatæ* in bar to the said action, and prays that the same may be admitted as valid by this honourable Court, and that the claim of the plaintiff may be dismissed with costs.

The plaintiff excepted to the defendant's exception or plea in bar as insufficient in law for the following causes:—

1st. That the said exception or plea in bar does not deny, or confess, or in any manner whatever answer the said declaration, so far as the same alleges and offers to prove special circumstances of error and mistake, entitling the said plaintiff to be relieved by this honourable Court from the operation of the judgment in the said exception or plea in bar and in the said declaration mentioned, in case the Court should be of opinion that in the absence of such circumstances the exception of *rei judicatæ*, as pleaded by the said defendant, would be a conclusive bar to the action of the said plaintiff in the declaration mentioned.

2ndly. That there is not in the said exception or plea in bar any positive or sufficient averment that the fraud

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and deceit of the said defendant for which the said plaintiff recovered the judgment in the said exception or plea in bar mentioned is the same fraud and deceit of the said defendant which is in the declaration in this case mentioned. And upon these grounds the said plaintiff excepts in law to the said exception or plea in bar of the said defendant, and prays that it may be set aside with costs.

This day, after hearing parties, the Court sustained the plaintiff's exception to defendant's plea, with costs, and ordered that defendant do file a new plea or exception.

The defendant thereafter filed the following exception or plea in bar, in which he pleaded that plaintiff ought not to have and maintain this action in manner and form as by him has been complained of, for defendant saith (without answering to the several facts alleged in the said plaintiff's declaration) that on or about the 24th March, 1842, and before this honourable Court, the said plaintiff brought an action against the said defendant for alleged damages, by reason of the fraud and deceit of the said defendant, relative to the purchase of a quantity of 700 barrels of flour from the said plaintiff at Cape Town, on or about the 20th September, 1841; and that on or about the 5th of May, 1842, and before this honourable Court, the said cause was tried, and that the plaintiff recovered judgment against the said defendant for the sum of £600, as damages awarded to the said plaintiff by reason of the said fraud and deceit of the said defendant in the matter aforesaid.

And the defendant further saith, that the defendant has satisfied the said judgment of this honourable Court, and that the action now brought against the said defendant by the said plaintiff is the same identical cause of action hereinbefore set forth as formerly brought by the said plaintiff against the said defendant, and wherein the said plaintiff recovered judgment against the said defendant as aforesaid, and that the several sums now demanded by the said plaintiff in the present suit arose from the very same bills whereupon the said plaintiff founded his said claim for damages on the grounds of fraud and deceit. And the said defendant further saith, that upon these grounds it is not competent for the said plaintiff to bring the present action, whereupon the said defendant proposes the exception *rei judicatæ*, and prays that the same may be admitted.

And as to the prayer made by the said plaintiff to be relieved from the operation of the aforesaid judgment of the said 5th March, 1842, the said defendant saith that if the said exception *rei judicatæ* be well founded at law, it is not competent for the said plaintiff to pray that the same may be overruled upon a subordinate prayer of relief.

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Wherefore the said defendant prays that the said exception *rei judicatæ* may be admitted, and the claim and prayer for relief made by the said plaintiff be rejected, and the said plaintiff condemned in the costs.

Plaintiff, in his answer to defendant's exception or plea in bar, pleaded that as to the exception or plea in bar by the said defendant first pleaded or proposed, to wit, the exception or plea in bar of *rei judicatæ*, he ought not, by reason of anything in the said exception or plea in bar alleged, to be barred from maintaining his said action, because he saith that the cause of action in the declaration in this action mentioned is not the same with, nor is the same included in, or in any manner affected by, the cause of action in the said plea mentioned, and for and in respect whereof the said alleged judgment in the said plea mentioned was recovered; and therefore prays that the said plea may be rejected, with costs.

And as to the second plea or allegation in law of the said defendant, wherein he states that it is not competent for the said plaintiff to pray that he may be relieved, according to the prayer in that behalf in his declaration contained, from the operation of the judgment of the 5th May, 1842, in case the exception of the *rei judicatæ* could but for such relief be well founded, the said plaintiff saith that it is competent for him to pray for such relief under the particular circumstances of this case, as the same are in his declaration set forth, and he submits this question as matter of law to the judgment of this honourable Court, and prays that this Court, in case it should be of opinion that the said exception of *rei judicatæ*, as pleaded by the said defendant, is *prima facie* a bar to the action, will permit the said plaintiff to prove the circumstances by him alleged, in order to show that the said judgment ought not in law and justice to be allowed to be such bar; and that upon such proof the said plaintiff may be relieved against the said judgment, and that the same may be set aside so far as it would appear to prevent the said plaintiff from recovering the sum of money claimed in this action.

Defendant, in his replication to plaintiff's answer, denied the allegation in the said answer contained, and prayed that the same may be inquired of by this honourable Court; and for replication to the allegations in support of the prayer for relief, he joined in praying the judgment of the honourable Court on the said averments, the same being denied by the said defendant.

This day (24th November, 1842), the *Attorney-General* argued against the exception *rei judicatæ*, on the ground

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that the amount now sued for had not been claimed in the former action, nor adjudicated on by the Court, but, on the contrary, had been expressly excepted from the judgment of the Court, on the ground that it had not been claimed in the former action. He then argued in support of his claim, if otherwise the exception of *res judicata* would be good, and argued the exception to this claim taken by defendant, and quoted *Van Leeuwen's Comties., pp.* 36 *and* 37; *Huber Prælectiones, vol.* 2, *p.* 163, *lib.* 4, 1, § 7; *Voet* 49, *tit.* 2, *passim; Second Daniell's Chancery Practice, pp.* 688, 689; *Voet* 4, 1, § 4 *and* § 26; *Domat's Civil Law* 4, *tit.* 6, § 1, *p.* 3. *Musgrave* on the same side, quoted *Harrison's Digest, p.* 9; *Chitty's Equity Index, p.* 95; *Henry's Notes to Van der Linden's Inst., p.* 466.

Cloete, contra, in support of the exception of *res judicata* founded on the admitted fact that the sum of £600 awarded by the former judgment did include a certain portion of the bill which is made the ground of the present action. (*Voet* 44, 2, 3, 42, 1, 27, and 28, 2, 13, 13, 42, 1, 19.)

The Court found that the exception *rei judicatæ* taken by the defendant in respect and by reason of the judgment of the Supreme Court recovered by plaintiff against defendant on the 5th May, 1842, is well pleaded, in respect and by reason of said judgment, as it now stands on record; but that the plaintiff on proving the facts alleged by him in his declaration as the ground on which he claims to be relieved from the operation of the said judgment, so far as the same might, by reason of the exception *rei judicatæ* founded on it, bar or foreclose him from maintaining his present action, is entitled in law to be so relieved. The Court therefore repels and dismisses the exception taken by defendant against the plaintiff's claim to be so relieved, and *hoc statu* repels and dismisses the exception taken by defendant of *rei judicatæ*, and orders the defendant to file a plea admitting, denying, or confessing and avoiding, first, the facts alleged by plaintiff in respect of which he claims to be so relieved from the operation of the said judgment as aforesaid, and, secondly, the facts alleged by the plaintiff as the ground of his cause of action for the sum now claimed by him from defendant.

Judgment as to costs reserved.

Defendant thereafter filed a plea, in which, admitting the facts alleged by the plaintiff in his said declaration in respect of which he claims to be relieved from the operation of the said judgment of this honourable Court of the 5th May, 1842, and also the facts alleged by the plaintiff as the ground of the present cause of action, yet the defendant saith that he is willing and ready to allow the said

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judgment to be amended, by allowing the plaintiff to recover judgment against the defendant for the sum of £90, less the sum of £24 8*s.* 3*d.*, that is to say, for the sum of £65 11*s.* 9*d.*, to which sum the said plaintiff has limited his claim for damages in the present action. But the defendant saith that although the plaintiff hath obtained "relief" from this honourable Court, in respect of the error or mistake by him alleged, in not introducing the amount of the bill of £90, which became due on the 20th April, 1842, in the former action, that yet the plaintiff is not entitled upon the said ground to claim any further interest on the various other bills which were set forth, and upon which he had recovered judgment before this honourable Court on the 5th May, 1842; and upon these grounds, the said defendant saith that he is ready and willing to allow judgment to go against the said defendant for the sum of £65 11*s.* 9*d.*, together with interest thereon from the 20th April, 1842, but prays that the further claim of plaintiff for further interest and costs be rejected.

In his replication, plaintiff joined issue with the above plea.

This day (7th February, 1843) the *Attorney-General* maintained that the declaration in the original case was so framed as to include in the £600 claimed as the amount of damage, the interest due on the bills up to the date of the judgment. Therefore he maintained that, as the judgment had in that case been given for a sum which, after giving the defendant credit for the £134 2*s.* 8*d.*, £9 14*s.* 5*d.*, = £124 8*s.* 3*d.*, recovered from De Kock, covered more than the amount of the bills for £700, and the sum of £9 12*s* 7½*d.*, being the interest due on said bills up to the date of the judgment, this judgment must be held to have included in the sum of £600, damages awarded by it, this sum of £9 12*s.* 7½*d.* of interest due previous to its date, and therefore that he was now entitled to have judgment for the whole amount of £90, being the amount of the last omitted bill less only £14 15*s.* 7*d*½., being the balance of the £600 awarded, after discharging the amount of the other bills previously due, and the £9 12*s.* 7½*d.* of interest due previous to the date of the judgment.

Cloete, contra.

Afterwards, by consent, judgment for plaintiff for £65 11*s.* 9*d.*, with interest thereon from 20th April, 1842, and costs, with the exception of the costs of this day, which plaintiff is to pay defendant.

Postea (10th May, 1842).—Immediately after judgment had been given, and without any demand made on

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defendant for payment of the sum awarded, or cession of Mostert's acceptance, in terms of the judgment, the plaintiff had taken out a writ of execution, and caused the same to be executed in the afternoon of the same day, by causing the Sheriff to seize defendant's property.

This day, *Cloete*, for defendant, moved that the said writ of execution might be set aside, with all the proceedings that have followed thereon, with costs; and referred in support of the motion to the 50th section of the Charter, and the 36th and 37th of the Rules of Court.

The *Attorney-General*, without opposing the motion, or denying the validity of the grounds on which the motion had been made, produced an affidavit of plaintiff's attorney, showing the facts which had led the plaintiff to adopt the summary proceedings to which he had recourse.

Motion granted, as prayed, with costs.

The *Attorney-General*, for plaintiff, then moved that execution might now be issued against defendant, who has lodged his petition for leave to appeal, on giving security in terms of the Charter, in case the judgment of the Court should be reversed on appeal.

Defendant did not object.

Ordered as prayed.

STENHOUSE, RESPONDENT, *vs.* KIRSTEN, APPELLANT.

Magistrate's jurisdiction. Error in summons as to name.

It is not beyond a magistrate's jurisdiction to decide on a claim of £10, *being the balance of an account, the total amount of which would have been beyond his jurisdiction.*

Error in summons as to plaintiff's name must be taken objection to initio litis, and not after issue joined.

1842. May 6.

Stenhouse, Respondent, vs. Kirsten, Appellant.

In this case the plaintiff had summoned the defendant before the Court of the Resident Magistrate of Cape Town. The summons set forth as follows:—

"Nicholas Stenhouse ,&c., complains that the defendant is indebted to him in the sum of £8 11*s.* for beer sold and delivered, &c., and prays that defendant may be adjudged to pay the same, and further that the defendant hath possessed himself of two empty hogsheads of the value of £1 9*s.*, which he unjustly detains from the plaintiff; and the plaintiff prays he may be adjudged to restore to him the said hogsheads, or pay him the value thereof.

With the summons the following account was served on defendant:—

1839.				
August 5.	To three hhds. beer		£8	11
„ 24.	To two do. do.		5	14
Sept. 5.	To two do. do.		5	14
			£19	19
Cr.				
August 24.	By cash	£5 14		
Sept. 6.	Do.	5 14		
		£11	8	
			£8	11
To hhds., casks to be returned or pay the value			1	9
			£10	0

Defendant appeared and denied the debt, and objected to the jurisdiction of the Court, the original sum being above £10.

Objection overruled, the amount claimed by plaintiff being only £10.

2ndly. Defendant objected to the summons, inasmuch as the same is not drawn according to the Rules of Court, as it embodies two cases instead of one.

Objection overruled.

Case postponed at the request of the parties until 13th, for the production of plaintiff's ledger and day-book.

On the 13th, the plaintiff produced his books and was sworn. In the course of the examination he stated that his name was Nicol. Defendant objected to the summons, it appearing that plaintiff's name is Nicol, and not Nicholas, as inserted in the summons.

Objection overruled.

Judgment for plaintiff, with costs.

The defendant brought the judgment under review,

But the Court held that the objection founded on the mistake of "Nicholas" instead of "Nicol," even if it would have been good under any circumstances, could only be taken *initio litis*, and not after the parties had joined issue, and therefore had been rightly overruled.

They held that the sum or matter in dispute was not above the value of £10, and that the objection of want of jurisdiction had also been rightly overruled, and affirmed the judgment of the Magistrate's Court, with costs.

MAYNARD, APPELLANT, *vs.* ADAMS, RESPONDENT.

Conditions of sale, expenses of.

Where conditions of sale required the purchaser to pay, inter alia, the expenses of the conditions of sale, and five lots were at first put up separately and not sold, and then put up in one lot and sold to M., held that he was only liable to pay for one and not five conditions of sale.

1842. May 6.

Maynard, Appellant, vs. Adams, Respondent.

At a sale of certain landed property sold by the respondent by auction, under condition, "that the purchaser shall pay the transfer duty, &c., also the expenses of the diagrams of the property, of the transfer of the stamps and of the conditions of sale," &c., appellant purchased the lots marked 9, 10, 11, 12, and 13 in one lot, but having refused to pay the sum demanded of him as the expenses of the conditions of sale, the respondent sued him for the same in the Court of the Resident Magistrate of Wynberg.

The summons set forth that the defendant is indebted to plaintiff "in the sum of £2 14*s*., for the conditions of sale of landed property, situated, &c., &c., marked lots 9, 10, 11, 12, 13, embracing general conditions of said lots sold by plaintiff to the said defendant."

With the summons were served on defendant a copy of the following account:

"Cape Town, 8th November, 1841.

"Mr. J. M. MAYNARD,

"Dr. to C. W. Adams, for conditions of sale of landed property situated, &c., &c., marked lots 9, 10, 11, 12, 13, embracing general conditions of said lots, sold in the estate of the late Mrs. M. B. Batt to J. M. Maynard, 8th November, 1841—Rds. 36."

And a copy of the title, of the conditions of sale, and of the seventh condition quoted above.

Defendant appeared in person, and objected that he had not been properly summoned according to the 11th Rule of Court, said summons not being served together with copies of any documents, accounts, or bills, upon which the said complaint or demand is founded, and filed the copy of the documents served on him.

The Court overruled the objection, in respect that the service of the copies of the above account and condition upon which the plaintiff's claim is founded was a due compliance with the Rule of Court,—the demand of the

plaintiff not having any reference to or involvi g any question as to the property itself, in which case full copies of the whole conditions of sale would have been required to be served.

It appeared from the record that the defendant thereupon left the Court, saying, that as this objection was overruled, he should not defend the case further, but bring it in review on this objection.

Plaintiff called Robert Benfield, his clerk, who produced the five original separate conditions of sale for each of said lots, and also the original general conditions of sale of the five lots sold in one lot, signed by defendant, and swore that the claim made by plaintiff is a regular and established charge made in all sales of landed property by auction.

The Court gave judgment for £2 14*s.*, with costs.

Defendant brought this judgment under review.

After hearing *Cloete* for appellant, the Court held the objection to the service of the summons bad, and that the object of the rule had been sufficiently satisfied by the copies of the documents which had been served.

Cloete then proceeded to object that the "conditions of sale," which by the conditions of sale appellant was liable to pay for, were only the one copy signed by him for the purchase of the five lots in one lot, and not for the five copies of the separate "conditions" for the sale of each of the lots, when the same were first put up separately, and not sold.

The Court held, that as it appeared from the record, "that after the Magistrate had overruled the exception, the defendant had left the Court, saying, that as this objection was overruled, he should not defend the case further, but bring it under review on the exception," and that as the ground of defence now pleaded did not arise on the face of the record, and had not been taken by defendant in the Resident Magistrate's Court, it was not competent for him now to take it, and therefore affirmed the sentence of the Magistrate with costs.

The Court held that if it had been competent in the review to inquire into that matter, the defendant, under the terms of the "conditions of sale," would only have been bound to pay for the one copy of the conditions which he signed for the purchase of the five lots in one, whatever the expense of that single copy might be; and not also for the five separate copies for each lot when put up separately and not sold.

MANUEL *vs.* RENS.

Purchase and Sale. Debtor and Creditor.

De K. got a promissory note drawn in his favour by Mostert, at the instigation and in the writing of R., who lent the money to Mostert through the medium of De K. De K. endorsed the note in blank and handed it to R., who sent De K. to purchase rice from Manuel in the name of the parties to the note and on its security. Manuel agreed to sell the rice. R.'s name was not mentioned in the transaction; only De K.'s and Mostert's. Manuel debited Mostert with the amount in his books. R. managed to get the rice delivered at his own stores and sold it on his own account. De K. neither got rice nor money. Mostert surrendered. Manuel proved for the amount of the note in his estate, and then brought this action against R. The Court held that the note not having been the bonâ fide property of either De K. or Mostert, the purchase and delivery was in reality by and to R., and that R. was liable in this action accordingly on the re-delivery of the note to him by plaintiff.

1842. May 17. — Manuel vs. Rens.

This was an action to recover the sum of £108 for rice sold and delivered by the plaintiff to the defendant by one Christiaan de Kock, as the agent of the defendant, on the 18th of October, 1841.

Plaintiff called

Christiaan de Kock:—I am a baker. I know plaintiff, and Rens, and Mostert. Remember, in September last, getting the note now shown me from Mostert for £108, dated 16th September last. It was for £108 I lent him, and which I got from Rens for the purpose of being lent to Mostert. Rens proposed the transaction to me, and not I to him. He said, Mostert wanted a loan of £108, and had asked him for it, but that he did not like to give it to Mostert in his name, because Mostert was indebted to him already, and this would encourage Mostert to sign the bills for the flour to be purchased from Lawton. The loan was a loan from Rens to Mostert, and I only lent my name. The note is in Rens's writing. Immediately after Mostert went away, defendant asked me for his note, and I gave it to him, and he took it away. About three weeks or a month afterwards, he desired me to try and get it discounted. He told me first to go to plaintiff and to try and get rice for it. He told me he wanted some rice at his farm, and told me to go to Manuel's and to try and get rice for it; that he could

sell the rice quickly, otherwise he would have to wait three months for the money before he got payment of this note. I went to Manuel's. Defendant said I must apply to Manuel in the name of Mostert and myself. I showed the note to Manuel, and asked him if he would sell me any rice on that note? Manuel said yes. I think this was on the 16th or 17th October. I returned and told Rens that Manuel said he would give rice for the note, and returned the note to Rens. Afterwards, on the same day, defendant and Spengler, his clerk, came to me, and defendant sent Spengler with me to Manuel, and gave me the bill, and I was to ask Manuel if he would deliver the rice that afternoon. When we came to Manuel's he was not at home, and I went back to Rens and told him Manuel was out, and went away. I then gave him back the bill. I endorsed the bill blank the same day I got it from Mostert. On the afternoon of that day I saw wagons delivering rice at Rens's grandmother's house, in a store in which Rens always keeps his flour. I did not get a grain of the rice. I neither got money nor anything else in respect either of the bills or the rice. Mostert is insolvent, and possessed no property either in October or when the bill became due. My shop was shut up before the bill became due.

Cross-examined:—When I purchased this rice from Manuel I never mentioned to him Rens's name. I went on behalf of Rens, but I did not mention his name to Manuel. I signed the receipt now shown me, the body of which is written by Rens, and gave it to Rens.

"Received from Mr. P. Rens the sum of £108, being by me to Mr. P. Rens delivered, 108 bags of rice, acknowledging hereby to be paid in full, 18th Oct., 1841.

"(Signed) C. DE KOCK."

I had asked Manuel the price of the rice, and he said £1 per bag. I did not know of my own knowledge how many bags Manuel gave Spengler. Three days after Rens had got the rice, I happened to be at the house of Rens's mother, when a man called Morgenrode came in and asked Rens, who was there, if he would sell him rice. He said he could not give it for Rds. 12 per bag, which was what Morgenrode offered him. He went away. I asked him if he had sold the rice in town. He said yes. Upon this he said, "You must give me a receipt that I have received the rice for the £108 I have given Mostert; and if Mostert pays the note you may go and pay Manuel. You must give me the receipt for rice in this way, or otherwise I can't keep my books in order." I never offered or proposed to sell him the rice, nor had anything like a bargain or sale and pur-

1842. May 17. Manuel vs. Rens.

chase of the rice taken place between us. I never had the rice in my possession. I never gave a note or anything to Manuel to deliver the rice to Spengler on my account. All the share I had in the transaction was going to Manuel and asking him if he would give rice for that bill, which bill I afterwards gave back to Rens, from whom I had got it. I did not make any bargain with him for the rice. I merely asked him if he would give rice to the value of the note. I understood that he would give 108 bags for the £108 note. I know nothing of the delivering rice except seeing the wagons unloaded.

Jacobus Spengler called:—I know Rens. I was in his employment in October last, at the time some rice was got from Manuel. Rens and De Kock were standing together. De Kock asked me if I would go to Manuel's to receive the rice. I told De Kock if he would go with me I would receive it, because in the occurrence of Lawton's flour I had hired and paid the coolies, and could never get payment of it. De Kock went with me to Manuel's. I had the note for £108 in my hand to deliver to Manuel's clerk. I got it from Rens. De Kock was not present when Rens gave me the note in front of his door, after De Kock had gone with me to Manuel's. When I went to Manuel's with De Kock he had the note. We found Manuel not at home. I saw Rens again that day. He gave me the note. De Kock was not there then. He said, "There is De Kock's note to purchase the rice from Manuel, and send it up to my store in Waal-street." I went to Manuel's, gave the note to Mr. Manuel, received the rice, and brought it to Rens's store. I know Rens sold this rice. He sold 7,814 lb. to Miss Kilian; I know this because I delivered the rice myself. I took it from Rens's store to her store. I got a note from her at a month for Rds. 325 6, and the balance Rds. 325 6 in cash from her. This note was discounted in the bank and paid.

Defendant admitted that he got the whole of the rice into his possession, and sold and appropriated it to his own purposes.

John Reid:—I am plaintiff's attorney, and a notary. Mr. W. F. Bergh is trustee in Mostert's estate. I made application to him on the 21st January for payment of the note, and received for answer "no funds." On the same day I went to the place where De Kock had carried on business, but found it shut up, and after making inquiry, I could not find him. I have been served with a notice to produce Mr. Manuel's books. I have them. I produce the day-book. In it is the following entry, under date 18th October:—

"C. Mostert Dr. to merchandise for 87 bags rice, 16,200 lb., at 20s. per 150 lb."

Defendant called

William Ferdinand Bergh:—I am trustee in the insolvent estate of P. Mostert. Mr. Manuel has proved for this note of £108 in Mostert's estate. I have not sold the property in the estate, in consequence of a resolution of the creditors that it should be delayed until the decision in the case of Lawton *vs.* Rens. I am empowered and provided with funds by Mostert's father to pay all his son's just debts, on being indemnified by Rens that C. Mostert shall not be called upon to pay the acceptances given by him to Lawton, and, among the rest, to pay this note of £180 on Rens giving his guarantee.

Cross-examined:—The condition was to be, that Rens should guarantee the payment to Lawton of the £600 acceptance. An instrument, which was not signed, was drawn up this morning by Mr. Reid. It contains this condition:—

"This payment is made on condition that the appearer (Rens) shall forthwith pay to the said Thomas Lawton the sum of £600, being the sum which the appearer has been condemned to pay to him by the judgment of the Supreme Court, together with the sum of £90 2*s.* 5d., being the taxed costs of that suit."

He refused to sign the deed if it contained that condition; and so the negotiation stands, and the instrument was not executed.

Re-examined:—I know the deed as at first prepared did not contain this condition; and that he would have signed if it had not contained this condition. (Draft put in.) Had the deed been signed, I must have paid the £180 to the legal holder of the note.

Defendant put in De Kock's receipt to Rens, dated 18th October, 1841.

The Court, after hearing the *Attorney-General* shortly, stopped him, and called on *Cloete* for the defendant, who argued that Manuel had in fact bartered the rice for the bill, and taken the bill as full value for the rice, without looking to any other security than the credit of De Kock and Mostert, whose names were on the bill; and could no more claim on it against Rens than he could if Rens had gone himself to Manuel with the bill, bought the rice, and had given the bill in payment for it, and Manuel had received it as payment, without asking Rens to endorse it, and had given Rens a receipt in full for the price of the rice; and

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maintained that in this supposed case Manuel could have had no recourse against Rens, although both De Kock and Mostert became insolvent.

But the Court held that the case supposed was quite different from the actual case before the Court, and gave judgment for plaintiff as prayed, with costs. Plaintiff, on receiving payment, to deliver up the note.

The Court held that Manuel was led by defendant's instrumentality to believe that he was making a *bonâ fide* sale of the rice to one or other of the parties to the note, De Kock or Mostert, to whom the rice was to be delivered, and whose property it was to become, and from whom he was to receive, as the price, the note, which he believed was the property of both or one or other of them. That, being led to believe the transaction was a *bonâ fide* transaction of this nature, he was content to take this note without other security. Had this been the real transaction, if De Kock and Mostert had been unable to pay the note when due, he would have had no claim against defendant or any one else. But it did not follow from this that he now had no claim against Rens in consequence of the transaction which had actually taken place, and which, although the plaintiff had originally believed that he had sold and delivered the rice to De Kock or Mostert, was in reality a purchase of the rice effected, and a delivery obtained by Rens for his own account through the instrumentality of De Kock, his agent and tool, who, in fact, was himself no party whatever to the purchase and sale; that Rens was the party who was the real purchaser, and who had obtained delivery and possession of the rice, and became liable for the price of it to plaintiff. And as plaintiff had never agreed in any way with Rens, the defendant, to take the note, which was all that Rens's agent had given plaintiff for the price of the rice, as cash, without recourse on Rens in the event of its being dishonoured, nor had given Rens a receipt in full for the price of the rice, Rens remains liable for the price in the event of the notes proving valueless. And, consequently, as plaintiff had been unable to obtain payment of the note, either from De Kock or Mostert, he was entitled now to demand payment of the price from Rens, on condition of re-delivery of the note to Rens.

Dickson & Burnie *vs.* Schonnberg and Others.

Power of attorney cannot be varied or explained by verbal or written declarations.

1842.
June 1.

Dickson and Burnie *vs.* Schonnberg and Others.

During the hearing of this case, the plaintiff put in sundry documents and called and examined sundry witnesses, in the course of which examination he proposed to prove declarations made both verbally and by letter by Smit, respecting a certain power of attorney and instructions, which he had given to the defendant Schonnberg, and the use the latter had made of them.

Defendant objected to the admissibility of the evidence.

Objection sustained.

Devenish *vs.* Peacock and Joseph.

Separation a mensâ, toro, et communione bonorum.

Action by separated wife against trustees under the deed of separation to recover trust moneys.

Such trustees inadvisedly defending such action found liable in costs.

1843.
Nov. 28.

Devenish *vs.* Peacock and Joseph.

This action had originally been brought in the Circuit Court of Albany, from which, on the 29th September, 1842, it had been removed to the Supreme Court.

The plaintiff, then separated wife of John Devenish, claimed, in virtue of the deed of separation, hereafter quoted, £330 10*s.* 6*d.*, being one half of the amount of the sum for which her husband's half-pay commission had been sold, and which sum so claimed it was admitted by the defendants, who were the trustees appointed by that deed, they had become possessed of.

In their plea, defendants alleged that at the time they received the said sum of £330 10*s.* 6*d.*, the plaintiff knew that they would hold the said sum in trust for her and her minor children, to wit, to pay to her, for the maintenance and support of the plaintiff and her minor children, the interest upon the said sum until all the children should attain their majority, and the said plaintiff agreed thereto; and in pursuance of the said agreement the defendants paid plaintiff the said interest down to 31st July, 1842, and have tendered to her the subsequent interest, which plaintiff had refused to receive, and that some of the children are still minors, whereupon the plaintiff is not entitled to demand from them the said sum; and secondly, that even if the

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plaintiff had not known and agreed that the defendants should hold the said sum in manner aforesaid, yet that by virtue of their appointment as trustees they were bound to see that the said sum should be so received that the interest should be available for the support of the minor children, which duty they have well performed.

The plaintiff joined issue with the defendants on their pleas.

The *Attorney-General* stated that a copy of the pleadings had been served on plaintiff's husband, and put in a letter in which he declared that he relinquished all claim to the half of the price of his commission now claimed by plaintiff from defendants, and declined intervening in the present case.

Plaintiff put in the trust deed, dated 10th April, 1843, and closed his case.

Ebden, for defendants, called no evidence, and argued in support of the pleas.

The material facts of this case were, that, after the plaintiff and her husband had been judicially separated *a mensa, toro, et communione bonorum*, they had executed on the 10th April, 1830, a trust deed appointing the defendants to be joint trustees and curators of the whole of their joint estate and effects, and also joint superintending guardians over all their non-aged children; and conveying to them "the whole of their property, both movable and immovable, of what nature and kind soever, to be sold by the said trustees, and after the payment of all the just debts due by the said parties or either of them, the surplus is to be received and held by the said trustees in trust, to be by them put out at interest for the benefit of the six children of the said parties. The interest to be paid over annually to the said Ellen Devenish, for the purpose of her maintaining and educating the female children above mentioned, and the respective shares or portions of the capital are to be paid over to the beforementioned children whenever they shall respectively attain the age of twenty-one years, or upon the day of their marriage, whichever may first happen. The said female children to remain with the said E. Devenish, subject, however, always to the superintendence of the said R. Peacock and G. C. Joseph. And the said John Devenish, on his part, doth covenant, promise, and agree that he will quarterly and every quarter, as he may become entitled to his half-pay as a reduced lieutenant of the late Cape Corps, cause and allow the said half-pay to be received by the said trustees, who are hereby authorized to pay one half thereof to the said Ellen Devenish and the other half to the said John Devenish."

The Court were unanimously of opinion that this deed created two trusts, one in favour of the children and another in favour of the plaintiff and her husband. That

the trust in favour of the children was limited to the surplus of the proceeds of the movable and immovable property, which the trustees were directed by the deed to sell, remaining after payment of all the debts of the parties. That it was clear from the provisions of the clause last above quoted, that the annuity which the husband derived from his half-pay formed no part of the property conveyed to the trustees for the purpose of being sold and the surplus held in trust for the children; and, consequently, under the trust deed the children had no right to or interest in this annuity or any part of it; on the contrary, it formed the subject of the second trust, and was conveyed to the trustees in trust, one half for the use of the plaintiff and the other half for the use of her husband. That the only title under which the trustees had obtained possession of the half of the price which Devenish had received for his half-pay was, as being the trustees of the plaintiff, and not as trustees or guardians of the children; and that as Devenish had relinquished all claim to this half, the plaintiff had the sole and entire right to and interest in it, and was therefore entitled to demand immediate payment of it from the defendants, who, as her trustees, had got possession of it merely to reserve it from Devenish and secure it for plaintiff. That the plaintiff, by allowing this money to remain in the hands of her trustees since 1833, and drawing annually the interest of it from them, did not thereby alter or impair in any way her absolute right to it. That the defendants had failed to prove any agreement, either express or tacit, on the part of plaintiff to allow the defendants to hold this money in trust for the maintenance and support of the remaining minor children. That as the terms of the deed were themselves so clear as to admit of no reasonable doubt as to their true meaning,—as the defendants had, without taking the advice of counsel, resisted plaintiff's demand, and forced her to bring the present action, and defended it,—as they had done so without consulting the four children out of the six who were now majors, and who, if the defendants' construction of the deed were right, had, by virtue of this deed right to four-sixths of the money in dispute,—and as they had claimed in the plea a right to retain the whole of the sum in question until the majority of all the children, contrary to the provision of the deed, which gave to each of the children, on attaining majority, his share of the property held by the trustee in trust for the children,—they had, in defending this action, acted with so much impropriety, and so contrary to sound discretion, as to render them justly liable to the plaintiff for the costs to which she had been put by this action. And therefore gave judgment for plaintiff, as prayed, with costs.

THE MUNICIPALITY OF GRAHAM'S TOWN *vs.* FORD AND JEFFREYS.

General Municipal Ordinance, No. 9 of 1836: Power of municipalities to make regulations under provisions of.

1844. Feb. 8. „ 29.

The Municipality of Graham's Town vs. Ford and Jeffreys.

This was an application for review of a judgment given by the Resident Magistrate of Albany for the defendants in a cause in which the Commissioners of the Municipality of Graham's Town were plaintiffs.

The summons in the Magistrate's Court set forth that the defendants "were indebted to the plaintiffs in the sum of £1 5*s*., being one per cent. on £125, for the sale of 11,000 lb. of hides, the produce of the tribes beyond the boundary of the Colony, sold and delivered by the said defendants by private contract to one J. Black, in or about the months of May and June, 1843, within the limits of the Municipality, and which said percentage is due by the said defendants to the plaintiffs by reason of such sale within the limits aforesaid, under and by virtue of section 35 of the amended and additional regulations for the Municipality of Graham's Town, duly approved and allowed by proclamation of His Excellency the Governor, dated 2nd January, 1843, under the provisions of the 11th section of Ordinance No. 9, 1836."

The debt was denied.

The defendants admitted that the defendants did, in or about May or June, 1843, sell to J. Black, as agent for W. R. Thomson, about 10,000 lb. of Kafir hides, the produce of the tribes beyond the boundaries of the Colony, of the value of £150, within the limits of the Municipality; and that defendants have refused to pay, and have not paid, the percentage sued for.

When the case was brought in review in the Supreme Court, the defendants further admitted that the said hides had been delivered by them to Mr. Black, within the Municipality, and that no point had been made before the Resident Magistrate that such delivery was not proved or admitted to have been so made.

The 35th section of the Municipal Regulations referred to is as follows:—"All colonial produce (wool alone excepted) and all articles of produce or manufacture of the tribes beyond the boundaries of the Colony, and which shall be sold or bartered within the Municipality of Graham's Town, but not sold in the public market, shall pay the usual fees of registry; and percentage of half per cent. *ad valorem* shall be charged to the buyer and to the seller, and notice thereof given to the clerk of the market within twenty-four hours after any such sale; and in default of

the fees and percentage as aforesaid, both the seller and buyer shall be severally subject to a fine not exceeding £10."

The defendants maintained that the regulation in question had not the effect of law; that the commissioners had not the right to levy any tolls other than those specifically mentioned in the said Ordinance; and, consequently, the regulation endeavoured to be enforced was at variance with and repugnant to the provisions of that Ordinance, and was therefore contrary to law.

The Resident Magistrate gave judgment for defendants, with costs, on the ground that the Ordinance No. 9, 1836, gives no power to a meeting of householders to make such a regulation as that contained in the 35th section of the amended town regulations.

After hearing the counsel of both parties respectively, against and in support of the judgment, the Court deferred its decision.

Postea (February 29).—The following judgment was given:—The Court were unanimously of opinion that the 6th section of the Ordinance authorized the commissioners therein referred to, and the 11th section authorized the meeting of householders therein referred to, to make all such municipal regulations as they may deem expedient, provided that nothing in any such municipal regulation contained shall be repugnant to or inconsistent with the true intent and meaning of the provisions of the said Ordinance. And that all such regulations, when approved by the Governor, with the advice of the Executive Council, and published by the Governor, by proclamation, in the *Gazette*, become as legal, valid, and effectual as if they had been inserted in the Ordinance.

That the regulation in question is, therefore, valid, legal, and effectual, provided it is not repugnant to or inconsistent with the true intent and meaning of the provisions of the Ordinance. That according to no legitimate construction of the 6th section or 11th section can it be held that a regulation is necessarily repugnant to or inconsistent with the provisions of the Ordinance, merely because the Ordinance contains no provision expressly and in so many words authorizing the commissioners or meeting of householders to make that particular regulation. The power given by the 6th and 11th sections is general, and limited only by the restriction that they shall contain nothing repugnant to or inconsistent with the true intent and meaning of the provisions of the Ordinance; and from the preamble of the Ordinance it is shown that its true intent and meaning is to make due provision for the better regulation of certain

1844. Feb. 8. „ 29.

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matters and things of a local nature within the several districts, towns, and villages in this Colony.

That to raise a revenue on property, real, or personal, situated within the Municipality, for the purpose of defraying the expenditure for municipal purposes of a local nature, and for the benefit of the inhabitants of the Municipality, is within the purpose and intent of the Ordinance; that the provisions of the 28th section of the Ordinance, respecting the assessment of rates on immovable property, has not the effect of restricting the Municipality to that kind of assessment for raising the revenue, but is only directory that this assessment shall be made in a certain way and for a certain time.

That, on examining sections 31, 33, 34, 35, 36, 37, 38, 39, 42, 43, 44, and 45 of the Ordinance, it will be seen that they were not intended to give, and in truth do not give, power to the municipal legislature to make regulations respecting the local matters and things therein referred to, but were intended to have, and have, the effect of authorizing the commissioners to carry into execution regulations respecting these matters and things made by the municipal legislature, in virtue of the general power given to them by the 6th section and 11th section of the Ordinance to make such regulations as they may deem expedient.

That it has never been doubted that a Municipality may make regulations imposing market duties on articles sold in the market established by the Municipality; yet it will be seen that the 38th section, which is commonly, but erroneously, supposed to give them the power of imposing such duties, gives them no such power; and that they possess it solely in respect of the provisions of the 6th section and 11th section. That regulations made for raising a municipal revenue for purposes *bonâ fide* local and municipal by a toll on all articles which shall be brought into the Municipality from any place without the same, come strictly within the view and intent of the preamble of the Ordinance, and are, therefore, when duly approved and published, legal and valid. That if the Municipality possess, as it has now been shown that it does, the power to make such a regulation as the last-mentioned, *a fortiori* it must have power to make a regulation which, like the 35th section, imposes a duty only on such produce as, having been brought into the Municipality, shall be sold or bartered within the Municipality, and not on the public market.

That it is true that the 35th regulation is so drawn that it may be construed as imposing a duty on articles which were never even brought into, or were within, the Municipality, provided the same to have been made the subject of a

contract of sale or barter, when the parties making such contract were within the Municipality;—that such a regulation is *ultra vires* of the municipal legislature, because it is not a regulation of any local matter or thing, but an attempt to impose a tax on property which had never been within their limits; and, consequently, if—instead of its being admitted that the hides in question were delivered to the buyer within, and must therefore necessarily have been brought within, the Municipality—it had been proved that at the time of the sale they were lying at Algoa Bay, and had never thereafter been brought within the Municipality of Graham's Town, the Court would have sustained the judgment of the Resident Magistrate, on the ground assigned by him, notwithstanding that the regulation had been approved and published by the Governor.

That a regulation, in so far as it relates to matters and things as to which the municipal legislature were authorized by law to make regulation, will be and is legal and valid, although its provisions may be to a certain extent illegal and invalid in so far as it relates to matters and things as to which the municipal legislature were not authorized by law to make regulations.

It is true that, in the exercise of the power given by the Ordinance to municipal legislatures to make regulations not repugnant to or inconsistent with the true intent of the provisions of the Ordinance, they may make regulations which may work injustice or injury to those inhabitants of the Municipality who have no voice in its legislation, or to persons not belonging to the Municipality; but the Ordinance has provided a check against this by requiring that the regulations, before having any effect, shall be approved of by the Governor, with the advice of the Executive Council. If the Governor and Council do their duty, and examine carefully into the nature of the regulation submitted for their approval, no such injustice or injury will be occasioned; if they do not, then the Colonial Legislature must provide some other more effectual check. On these grounds, the Court reversed the sentence of the Resident Magistrate, and gave judgment for plaintiffs, as prayed, with costs.

De Smidt *vs.* Hofmeyr and Others, Curators in the Estate of P. J. Sandenberg.

Action to admit proof of debt. Defence, forgery of instrument of debt. Evidence of other forgeries inadmissible, except by way of rebuttal.

1884. Feb. 13.

De Smidt *vs.* Hofmeyr and Others, Curators in the Estate of P. J. Sandenberg.

This was an action to compel defendants, as curators of the estate of Pieter Jacobus Sandenberg, to admit plaintiff to prove a certain debt against, and rank as a creditor upon, the said estate, under and by virtue of a certain underhand bond, for the sum of £500, passed, signed, and executed by one Hercules Alexander Sandenberg in favour of plaintiff, whereof the said Pieter Jacobus Sandenberg and one Matthiessen de Wet (now an insolvent) had bound themselves as sureties.

Defendants pleaded that the name or signature of "P. J. Sandenberg," at the foot of the bond in question, was not the signature of the said Pieter Jacobus Sandenberg.

It was admitted that if the signature of P. J. Sandenberg had been forged, it had been forged by H. A. Sandenberg, the principal debtor in the bond.

On the cross-examination of T. Sutherland, one of the plaintiff's witnesses, he stated:—[*I knew H. Sandenberg, and that during the last eight years he forged extensively to upwards of* £20,000. *I have in my possession paper forged by him to the amount of* £1,700 *or* £1,800, *on* £600 *or* £700 *of which P. J. Sandenberg's name is forged.*]

The Court held that proof that H. Sandenberg had forged other documents to a large amount, and some of them on P. J. Sandenberg, was not admissible evidence in this case to prove the forgery of the signature in the present case, and therefore struck out the cross-examination printed within brackets in italics; but the Court afterwards stated that such proof of forgery by Hercules Sandenberg on P. J. Sandenberg, about the time when the document in this case must have been signed or forged, was evidence to rebut an argument founded by plaintiff on the admission made by P. J. Sandenberg, that in 1839, he would, if asked by his brother, have signed a surety obligation for him to a much greater amount than that of the document in question; that, therefore, as H. Sandenberg could have had no motive to forge his brother's signature, the presumption is that it is genuine.

After hearing the evidence adduced by both parties, the Court found P. J. Sandenberg's signature was a forgery, and gave judgment for defendants, with costs.

STEPHENS, APPELLANT, *vs.* ANDERSON, RESPONDENT.

1814. Feb. 29.

Stephens, Appellant, *vs.* Anderson, Respondent.

This was an application for review of the judgment of the Resident Magistrate of Wynberg, in a case in which the respondent was plaintiff and the appellant defendant.

Ebden, on behalf of the defendant, objected to the insufficiency of the summons for review, in respect that it merely specified as the grounds upon which the application for review was founded, that the judgment of the Magistrate was "erroneous and contrary to law," and did not, as directed and required by Rule 190, state "shortly and distinctly the grounds upon which the party seeks to have the proceeding set aside or corrected."

The Court held that, although cases could be supposed in which merely from inspection of the record, it could at once be seen, both that only one question of law had been raised in the cause, and what that one question was, in which cases, therefore, a statement in the summons that the review was sought on the ground that the judgment "was erroneous and contrary to law" might be a sufficient compliance with the 190th Rule of Court,—yet that as in this case the record showed that there had, in the course of the trial, been several questions of law raised and decided against the appellant, and it could not be ascertained from the record which of them it was that the plaintiff sought to set aside the judgment thereon, as erroneous and contrary to law,—the statement in the summons was insufficient, and therefore dismissed the application, with costs.

Same found *Grunet vs. Jansen*, 30th November, 1836. *Vide Clerk of the Peace vs. Dreyer*, 23rd August, 1837, where a similar summons was sustained under different circumstances.

HAVENGA *vs.* STEYN.

Pleading. Rule of Court 19.

Where in an action of sale and purchase the defendant first pleaded the general issue, and then by special plea admitted the purchase, but pleaded payment, held inconsistent pleas.

Negotiorum gestor, commencement of proceeding by.

Absence or insufficiency of warrant to sue must be founded on before issue joined and ante litis contestationem. Where an objection was raised in the middle of a case,

the Court (by majority, MUSGRAVE, J., *dis.) proceeded with the case, and gave judgment, but stayed execution until the validity of such objection was thereafter inquired into.*

1844. Feb. 29.

Havenga vs. Steyn.

This was an action to recover £30, as the price of certain sheep.

The defendant pleaded, first, that plaintiff ought not to have his action, because he, the defendant, denies all and every allegation in the declaration contained, and joins issue thereon with the said plaintiff; and for a further plea, the defendant says, that admitting that he, the defendant, purchased the said sheep for the sum of £30, as in the declaration set forth, yet that defendant then made and delivered to plaintiff, and that plaintiff then and there accepted and received, a promissory note for the said sum of £30, on account and in satisfaction of the said sum of £30, the purchase money of the said sheep in the said declaration mentioned.

The plaintiff maintained that in respect of this admission in the second plea, and notwithstanding the general denial in the first plea, the defendant must be held so to have admitted the sale and purchase of the sheep as set forth in the declaration as to preclude him from now denying it, and putting the plaintiff to the proof thereof. After hearing *Ebden contra,* the Court held that the defendant's admission in his second plea had the effect in law contended for by plaintiff; and that after such an admission made in his second plea, his general denial of the plaintiff's allegation must be construed as if the admission in the second plea had been introduced into the first plea as an exception to the general denial; and that to hold the contrary would be not only inconsistent with the 19th Rule of Court, but would be to permit the defendant to plead two pleas expressly contradictory to each other.

Plaintiff called William Gadney,—who stated that defendant had admitted the debt to him, and promised to pay the price of the sheep to him on account of his brother, who was a creditor of Havenga's. Havenga was then on tocht. He (witness) had no power of attorney from Havenga to bring this action, nor to be his agent, nor any instructions from him to commence this action. He had, however, signed, as *q.q.* for Havenga, the warrant to Mr. Attorney Merrington to sue defendant. He had done so because Mr. Merrington told him it was necessary he should do so.

Plaintiff closed his case.

Ebden, in respect of the evidence given by Mr. Gadney, that he neither held a power of attorney from Havenga,

authorizing him to bring this suit, or to be his agent, nor any instructions of any kind on the subject, moved the Court to quash all the proceedings as null *ab initio*, and dismiss the action.

The Court were unanimous in holding that if this action had been brought by Gadney without any authority or instruction from Havenga, and that when this fact became known to Havenga, he should repudiate the action, the proceedings must be quashed and set aside as null *ab initio*.

MUSGRAVE, J., was of opinion that this consequence must follow even although Havenga, instead of repudiating this action, should adopt it and acknowledge Gadney as his agent, if originally it had been commenced without authority or instructions from Havenga.

The majority of the Court held that this last question required to be fully argued and deliberately considered before it should be decided either way, more especially if Havenga and Gadney should be able to prove such circumstances as in law entitled Gadney to be deemed to have acted in the capacity of a *negotiorum gestor* for Havenga. That although Gadney was not aware of having had any instructions or authority to sign the warrant of attorney for Havenga, yet that the attorney on whose suggestion he did so might at the time have had such instructions or authority from Havenga as fully to warrant Gadney to sign for him without Gadney's knowing it. That the 8th Rule of Court, which requires the attorney serving out process to file his warrant to sue, directs that such warrant shall be filed by the registrar, for the very purpose of enabling the defendant to examine it, and if deficient, to object to its insufficiency. That it was in the defendant's power to have forced Mr. Gadney to have produced the authority in respect of which he alleged he was entitled to sign the warrant to sue as *q.q.* for Havenga. That the insufficiency of the warrant was a preliminary objection, which ought to have been stated before the defendant joined issue, and more especially before he allowed the cause to be set down for trial, and the examination of the witnesses to be commenced, and although he might ultimately, if judgment should be given against him, obtain, either by motion or by action of reduction, that the whole proceedings should be set aside (to give him an opportunity of doing which, the Court would, if they gave judgment against him, suspend execution thereon for such time as might be necessary for that purpose), the defendant was not entitled at this stage of the cause—which had been arrived at and entered on solely from the neglect of defendant to object to the insufficiency of the warrant before *litis contestatii*—to interrupt the proceedings, and, taking the

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plaintiff or his counsel and attorney by surprise, compel them to defend themselves against an objection for which they were at present quite unprepared, although they might actually have a good answer to it either in fact or in law. That as it was possible the objection might ultimately turn out to be unfounded, it was a more convenient course of proceeding to finish the examination of the witnesses, give judgment, and suspend execution thereof for a time, than to stop the trial until after the objection should have been heard and decided, when, if decided against defendant, additional expense would be incurred in consequence of the necessity of again bringing the witnesses to attend the Court who were now present. The Court, on these grounds, repelled the objection *hoc statu*,—MUSGRAVE, J., *dissentiente*.

DOBIE *vs.* LAWTON.

BORRADAILE, THOMPSON, & PILLANS *vs.* LAWTON.

Counsel. Retainer, general and special.

June 6. — Dobie vs. Lawton. Borradaile, Thompson, & Pillans vs. Lawton.

The *Attorney-General* had a general retainer from Borradaile, Thompson, & Pillans.

Lawton's attorney sent him a special retainer in the cases *Dobie* vs. *Lawton*, and *Borradaile, Thompson, & Pillans* vs. *Lawton*, and two other similar cases in which he was defendant.

Borradaile, Thompson, & Pillans had not previously sent him a brief or a special retainer.

The *Attorney-General* declined receiving Lawton's special retainer in *Borradaile, Thompson, & Pillans* vs. *Lawton*, on the ground of his being generally retained by Borradaile, Thompson, & Pillans. He also declined receiving Lawton's special retainer in *Dobie* vs. *Lawton*, and the other two similar cases, on the ground that the cause of action was precisely the same in all the cases,—and that he could not do justice to the plaintiffs, Borradaile, Thompson, & Pillans, in the one case, and the defendant Lawton, in *Dobie* vs. *Lawton*, and the other two cases; and had also declined acting as counsel for the plaintiffs in Dobie and the other two similar cases against Lawton.

Ebden, for Lawton, complained to the Court of the Attorney-General's refusal to act for his client,—and maintained that the utmost effect that ought to have been given to the general retainer of Borradaile, Thompson, & Pillans

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Doble vs. Lawton
Borradaile, Thompson, & Pillans, vs. Lawton.

was to prevent his acting against them in any case in which they were parties, and in which he had received a special retainer for the other party, before he received their *special* retainer; and that even if it entitled him, notwithstanding a special retainer had been sent him from Lawton before he received their special retainer, to act as counsel for them, he was not warranted, on the ground of any consequential injury which they might thereby sustain, to refuse to act as counsel for Lawton in the other three cases, in which Borradaile, Thompson, & Pillans were not parties; and that, if he did not do this, he ought not to act against Lawton in *Borradaile, Thompson & Pillans* vs. *Lawton.*

The Judges were of opinion that this was a matter on which the Court could not, judicially, give any decision or opinion; and that if, at the request of the Bar, and to assist it, the Judges did give any opinion on the subject, their opinions were not entitled to any weight, except as the individual opinion of barristers who might be presumed to have had some experience in such matters, and who, being now removed from practice, could have no interest in the decision of the question one way or another to bias or prejudice their opinions.

WYLDE, C.J., was of opinion that the Attorney-General, although bound by his general retainer to be counsel for Borradaile, Thompson, & Pillans against Lawton, was bound, by the rules of the profession, to have acted as counsel for Lawton in the other three cases against him.

MENZIES, J., held that Borradaile, Thompson and Pillans' general retainer had precisely the same effect which ought to have been given to a special retainer sent by them prior to Lawton's,—and that, having thus engaged to give Borradaile, Thompson & Pillans his best services as their counsel, he had acted with proper delicacy and sound professional discretion, in refusing to act as counsel for their opponent in other cases in which the cause of action was the same.

MUSGRAVE, J., was of the latter opinion, on the same or nearly similar grounds.

DE WET *vs.* SMUTS.

Offer to sell, whether absolute or conditional. Conditional offer, how far binding on offerer before acceptance.

June 14.

De Wet vs. Smuts.

The plaintiff alleged in his declaration, that on or about the 20th December, 1843, the plaintiff and the defendant entered mutually into a treaty for the sale, by defendant to

1844. June 14. — De Wet et. Smuts.

the plaintiff, of the defendant's farm Hoogberg's Valley, &c., "which treaty having been by mutual consent kept open till the 2nd January, 1844, was then duly concluded and completed; at which time the plaintiff became the purchaser from the defendant of the said farm upon the terms and conditions in a certain memorandum of the sale and purchase thereof contained, which is in substance as follows:"—

"We, the undersigned, Johannes Jacobus de Wet, and Jacobus Uys, and Jacobus Schabord, hereby acknowledge, the first undersigned as purchaser and the second undersigned as sureties, to have bought from Mr. J. J. L. Smuts, his place called Hoogberg's Valley, &c., for the sum of 4,000*f.*, under the stipulation that the capital remain at interest for ten years, if the interest be paid on the day when due; and in case of the demise of one or both the sureties, to be supplied by others to the satisfaction of the creditor, &c. Further, that for the first four years only four per cent. shall be paid, and for the next five years five per cent. per annum, commencing from 1st February, 1844. The transfer to be effected within three months from this day's date, or sooner, if the transfer dues shall be paid by the purchaser, when at the same time the mortgage bond for the purchase amount shall be signed by the purchaser and sureties. For the due performance whereof we bind our persons and property.

"As Sureties: "As Purchaser:

"J. W. Uys. "J. J. de WET."

"J. E. Schabord.

Which memorandum has no date, and is not signed by the said defendant, but is in his handwriting.

Plaintiff further alleged that he had been always ready and willing to perform all the said stipulations, but that the defendant has refused to give him transfer; wherefore he prayed the defendant may be condemned to give him transfer, &c.

In his plea, the defendant first denied all the plaintiff's allegations, and put him to the proof thereof.

And secondly, as a further plea, the defendant alleged that the plaintiff, on a day in November last, came to the defendant, and offered to purchase defendant's said farm, to which defendant declared he would not consent, unless plaintiff could produce two sureties for the due payment of the price to be approved of by defendant. And that defendant then, at the desire of the plaintiff, drew out a certain writing containing certain conditions, being the terms under which the defendant declared at the time to plaintiff he was ready and

willing and would consent to sell the said farm, and delivered the said writing to plaintiff, who said he would endeavour to get it signed by his father-in-law, one J. W. Uys, and by one Schabord.

That some weeks subsequent to this, plaintiff again came to defendant, and informed him that the said J. W. Uys had refused to sign the said writing drawn out by defendant, and then tendered to defendant another writing, signed by J. W. Uys, and as this last writing contained conditions and terms different from those under which defendant had offered to sell his farm, and which were unsatisfactory to the defendant, the negotiation about the sale of the said farm between plaintiff and defendant was broken off, and this last mentioned writing returned by defendant to plaintiff. And, therefore, the defendant seeing that no other persons were present when what has been alleged by defendant took place, tenders his oath that the foregoing is *bona fide* the substance of his negotiations with plaintiff about the sale of the said farm.

In his replication, the plaintiff joined issue on the first plea, and denied all the defendant's allegations in the second plea.

Plaintiff put in the writing or memorandum set forth in his declaration, which defendant admitted to be that referred to in his plea as having been delivered by him to plaintiff, and that it was all in his handwriting, with the exception of the signatures of plaintiff, of J. W. Uys, and J. E. Schabord, all which signatures were admitted to be genuine.

Plaintiff also put in a writing, which was admitted to be that mentioned by defendant in his plea as having been tendered by plaintiff and rejected by him, and to be in the defendant's handwriting, and to have been signed by J. W. Uys; and called Jacobus Wilhelmus Uys, whose evidence contained nothing relevant to the decision of the case.

Plaintiff then called:

Jacques Jean Henri Smuts.—I am a nephew of defendant. I was at defendant's house on 2nd January last, when plaintiff came there. I was sitting with defendant on the stoep. Plaintiff came there and sat down. Defendant then said, "Well, what brings you here?" He replied that he came to conclude the sale of the place. Defendant said, "I am very sorry you have come too late,—or you have fished behind the net (I am not sure which); I have sold it." Plaintiff then stated the cause of his delay, but I don't recollect what cause he stated. Defendant then told him he was very sorry, because he would have liked that he should have had the place, and said, "You may as well be satisfied, for I really do not know what Mr. Brunet is to do with it

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[Mr. Brunet was the person who in the meantime had purchased the place]; and then you may have an opportunity of buying it much cheaper." Plaintiff then went away. I saw no paper produced by plaintiff, and he could not have done so without my seeing it. Plaintiff made no remonstrance, or complaint, or grumbling, when defendant told him the above. He did not express astonishment that defendant had sold it before the time expired within which plaintiff was to come. I had no reason to presume, from what passed in my presence, that there had been any time agreed upon within which plaintiff was to come to conclude the sale. I am quite sure that plaintiff mentioned no paper.

Plaintiff closed his case and tendered his oath in supplement, and argued in support of his being entitled to give his supplemental oath, and quoted *Bell* 1 (*last ed.*), *p.* 326, and maintained that there was proof in this case that Smuts had made an offer to sell the place, and that, therefore, the plaintiff was entitled to prove the conditions under which the offer had been made by his oath in supplement. That the writing in defendant's handwriting proved the offer, and Jacques Smuts's evidence proved that defendant said to plaintiff, "You have come too late," thereby implying that there was some time within which plaintiff would have been entitled to come and insist on the conclusion of the sale, and that plaintiff was entitled to prove by his oath what that time was.

The Court postponed further argument on this point until defendant should have called his witnesses.

De Wet, for defendant, then called:

Charles Fairbridge:—I am clerk of Attorney Barker. I was present at a conversation between plaintiff and Brunet, in the first week of January, when I accompanied the latter and his wife to Hoogberg's Valley, which he had just purchased. We were at breakfast in the house at Hoogberg's Vlei, when plaintiff came in and began to speak, when Brunet, who did not understand Dutch, called me to interpret. I don't recollect the first of the conversation; but we walked out to the back of the house, and then plaintiff began to tell me a long story about an agreement which he said he had had with defendant about the sale of the farm. He said defendant had sold the farm to him, but had afterwards resold it to Brunet, breaking his faith with him. Brunet said he was sorry he had been disappointed, but it was not his fault. Plaintiff said he was aware of that. Brunet then said that when he had first applied to defendant about buying the farm, defendant said he could not sell it to him, as he was then under a kind of agreement with another party,—and that defendant had said that plaintiff,

who was the party, was to come on a Wednesday to complete the purchase, and had added, however, "I will give him time till Saturday," and if he does not come then I will conclude the bargain with you. I repeated this in Dutch to plaintiff, who then acknowledged that he was to have come to town on the Wednesday, but that he had been kicked by or had a fall from a horse, which prevented him, and that when he had come to town, or was going to town, he had been told he was too late, and that the place had been already sold. Plaintiff said it was true he was too late, and that he had not come when he ought to have come, but that he could not help it. Plaintiff then volunteered to point out the boundaries; and after some conversation about the price, &c., plaintiff resumed the conversation about the sale, and said that the bargain between him and Smuts had been concluded, not only in his own opinion, but in that of everybody else, because defendant one day, while walking on the farm, had said to him, "Now the place is yours, I hope you will do more for it than your predecessors have done for it; it is in a very dilapidated condition;" and said defendant had broken his agreement with him not because he had come too late to town, but because Brunet had given him 1,000*f.* or 1,200*f.* more for the farm than he was to have done.

Cross-examined:—I interpreted to Brunet all that plaintiff said. Plaintiff said nothing whatever about an action, and seemed as if he had intended to put up with the matter, and he expressed a wish to buy a part of the farm from Brunet.

George David Brunet.—I purchased the farm Hoogberg's Vlei from defendant. I saw an advertisement of it in the *Zuid-Afrikaan*, of which date I don't recollect, but it must either have been in the number of the 15th December or in that of the 22nd,—I rather think the latter; and on the evening of the 23rd, I called on defendant in order to ascertain his title to the farm. After some conversation, defendant agreed to give me a guide to visit the farm, and gave me to understand that he was then in treaty with another person about the sale of the farm; in the meantime, I should see the farm. He further said that the party with whom he was in treaty was a poor fellow, and that he would wish him to have the farm; that he had given him a paper to sign and get signed by two sureties; that he was to be up to defendant's next Wednesday (which was the 27th), but he added,—"to give him time, we will say Saturday." On Saturday, the 30th December, at about sunset, I went to defendant's, as had been agreed on, and asked him whether I was at liberty to make him an offer, and I then bought the farm, conditionally that the title to the quitrent was clear, which I did on the Monday. I paid 14,600*f.* for the

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farm. I might have closed the bargain completely on Saturday, if I chose.

Defendant tendered his oath and closed his case, and was proceeding to argue on the evidence, and against the plaintiff's right to join his supplemental oath, but the Court stopped him, and called on the *Attorney-General*, after hearing whom,

The Court absolved the defendant from the instance with costs:—in respect of the defendant's first plea, denying all the plaintiff's allegations and putting him to the proof thereof; seeing that plaintiff had not only entirely failed himself to bring any evidence to prove that the period within which, as he had alleged, he was entitled to conclude the bargain was the 2nd of January,—and that the witnesses of the defendant had proved that if there had actually been any period whatever agreed on by defendant, for plaintiff's acceptance of and compliance with defendant's conditions of sale, within which he would have been entitled to insist on the defendant's concluding the sale with him, that period did not extend beyond the 27th of December, before which it was admitted that plaintiff had not notified his acceptance of and compliance with those conditions.

The Court expressly abstained from giving any opinion that the mere delivery to plaintiff of the memorandum, written by defendant, and set forth in the declaration, would *per se*, and unsupported by any other circumstances, have had the effect of binding the defendant not to sell the farm to a third party until after the lapse of some period of time within which it would be competent for the plaintiff to accept and comply with its conditions,—or *per se* entitle him to give his oath in supplement to show what that period was.

Hill *vs.* Curlewis and Brand.

Injury literal. Pleading. Liability of editor of newspaper for publishing libel.

When the alleged libel contains two distinct libellous charges, plea is defective which, admitting the publication of the whole of the alleged libel, justifies only one of the charges, without in any way answering as to the other.

Allegations of absence of malice, and of publication through negligence, not sufficient either to free an unpaid editor from damages or to mitigate the damages.

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„ 29.

Hill vs. Curlewis and Brand.

This action was brought by Capt. Hill, Resident Magistrate of Malmesbury, to recover from the defendants £200, as damages for and on account of a false, scandalous, malicious, and defamatory libel contained in the following letter, of which the defendant Curlewis was the writer, and which was published in the *Zuid-Afrikaan* newspaper, of which the defendant Brand was the editor.

[Here the letter, which was a clear libel, was set out at length. It in substance averred that plaintiff, who, as magistrate, was on the Licensing Board, had, from private motives, withheld a licence, for which defendant Curlewis had applied; and, secondly, that while a licence had previously been granted to Curlewis, while in treaty for the purchase of a house of plaintiff, on the completion of the sale the licence had been refused to Curlewis and granted to other friends of plaintiff.]

The defendant Curlewis did not plead the general issue, but admitting that he wrote and caused to be published in the *Zuid-Afrikaan* the alleged defamatory libel, as fully set out in the declaration, denied that the plaintiff was entitled to claim any damages by reason of the said publication, because the contents of the alleged libel are true; and then proceeded to allege facts in justification, having reference solely to that part of the letter which related to the withholding the licence, without taking any notice of that part which related to the sale of plaintiff's house to defendant.

The defendant Brand, for plea, admitted the publication of the alleged libel in the *Zuid-Afrikaan* newspaper, and that he was and still is the editor thereof; but denied that he had any malicious intent or object in the said publication, and averred that the alleged libel was published through his neglect in not properly perusing its contents. And, admitting his liability as such editor, the defendant pleaded in further mitigation of the matter, that at the time of the publication of the alleged libel, he was, and still is, a gratuitous editor of the said paper, receiving no emolument as such, or for the publication of the said alleged libel. Wherefore he prayed judgment if the said plaintiff ought to have or maintain his aforesaid action to recover from him the amount of damages claimed.

In replication the plaintiff, as to the plea of Brand, pleaded that he ought not, by reason of anything in that plea alleged, to be barred from recovering from him the amount of damages claimed; and referred the amount of damages which he ought to recover, to the judgment of the Court; and, as to the plea of Curlewis, pleaded that he ought not, by anything contained in it, to be barred from maintaining his action against the said defendant, because

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the said plea, although it purports to justify the whole of the alleged libel, states only matter sufficient to justify a part of said libel, even supposing the whole of the matter in the said plea alleged to be true; and because he denies the truth of the whole and every part of the said last-mentioned matter. Wherefore he joined issue generally with the defendant upon the said plea; and, submitting that it is but a plea to part only of the declaration, and must be so construed, referred all questions, as well of law as of fact, and whether arising upon the pleadings in this case or to be determined by proofs to be produced, to the judgment of the Court.

After the pleadings had been opened, the Court expressed their opinion that the letter complained of contained two distinct charges against plaintiff, both of which, if false, were libellous. That the matter pleaded in justification was only sufficient to justify the charge in the first branch of the libel, and had no application to the second. That the defendant, by admitting the writing and publishing of the letter, "as set out in the declaration," having admitted writing and publishing the allegations in the second branch, his plea was defective, seeing that he neither admitted nor denied the conclusions in fact or in law founded by plaintiff on the allegations in the second branch, nor attempted to justify them. And that, if objected to by the plaintiff, the Court would have ordered the defendant in so far to amend his plea; but as the defendant's counsel stated that he had drawn the plea in its present form owing to a misapprehension of the principle of the rules of pleading as now established in England, under which he had considered he would be entitled to argue that those allegations were not libellous or actionable; and as the plaintiff's counsel stated that, in order to avoid delay, the plaintiff was willing to allow defendant under the present pleadings to maintain and argue that point, the Court allowed the case to proceed. The defendant Curlewis called witnesses to support his plea of justification, but completely failed in doing so. After which the Court adjourned.

This day (August 29, 1844), the *Attorney-General* was heard on the evidence for the plaintiff, and *Cloete* for the defendant Curlewis.

Brand, for himself, merely repeated the averments in his plea, without any explanation as to the cause or nature of his "neglect in not properly perusing the contents" of the libel before publishing it, and without expressing any acknowledgment of the falsehood of the libel, or any regret or apology for having published it.

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Judgment for plaintiff. Damages £50 against Curlewis; damages £50 against Brand; with costs against defendants both jointly and severally.

In giving judgment, it was stated by the Court that to sustain the averments made in the plea for the defendant Brand, either as an absolute defence against the action or even in mitigation of damages, wholly unsupported as they were by any evidence whatever, and without explanation, much less proof, of the cause or nature of his neglect in properly perusing the contents of the libel before publishing it, would be to lay down a principle which would completely destroy all responsibility of editors of newspapers for libels published by them in their papers; and that, considering that this defendant had neither expressed any acknowledgment of the falsehood of the libel he had published, nor any regret or apology for having published it, nor made nor offered any atonement of any kind for the injury occasioned to the plaintiff by the publication of the libel, there was no ground for making any distinction between him and the author of the libel in awarding damages.

Civil Commissioner of Clanwilliam *vs.* G. Low.

Transfer duty on exchanged estates.

Aug. 30.

Civil Commissioner of Clanwilliam *vs.* G. Low.

This action was brought in the Circuit Court of Clanwilliam. The declaration set forth that the defendant, on the 2nd May, 1842, entered into a bargain with J. H. Low, whereby the defendant exchanged with, and engaged himself to transfer, his half share of the place "The Hope," to the said J. H. Low, for and in consideration of the places "Drooge River" and "Wilgeboom," which places the said J. H. Low exchanged with, and engaged to transfer to, the defendant.

That by the proclamation of 2nd January, 1818, a transfer duty of four per cent. is imposed on the value of all estates changing proprietors, without sale, by exchange, which value is directed by said proclamation to be ascertained upon oath, by competent persons to be appointed by the magistrate of the district in which such estates are situated.

That in compliance with, and in terms of said proclamation, the value of the said places "Drooge River" and "Wilgeboom" has, by a competent person duly appointed by plaintiff for that purpose, been duly appraised at, and ascertained to be, £500; on which amount the defendant

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became liable and indebted to the Colonial Government in a transfer duty of four per cent., which by said proclamation is directed to be paid within six months from the date of the transaction by which the said estates were exchanged.

That by the Government advertisement of the 6th September, 1838, certain fines and penalties have been imposed in lieu of certain other fines and penalties fixed by the proclamation of 2nd January, 1818, on parties taking in exchange any estate, on their failing to pay the said transfer duty within six months; which fines and penalties are to be paid at the same time with, and over and above, the said transfer duty of four per cent., and *inter alia*, for a delay above five months, and not exceeding six months, a fine or penalty of eight per cent.

That the defendant having failed to pay to Government the said transfer duty on the said places "Drooge River" and "Wilgeboom," within six months from 2nd May, 1842, when the exchange thereof took place, and within six months subsequent to the expiration of the said first six months, the defendant, who has actually received transfer of the said places, but without paying the duty properly payable thereon, has become liable and indebted to the Colonial Government, over and above the transfer duty of four per cent., the full fine of eight per cent., or in all twelve per cent. on £500, being the appraised and real value of the said places, namely, in the sum of £60, together with the further sum of £4 12*s.* 3*d.*, being the expenses incurred in making the appraisement.

The defendant pleaded the general issue.

The cause was, by consent, removed to the Supreme Court.

The following facts were proved by the said evidence, or admitted by the parties:—

The Widow Low, mother of the defendant, and of his brother, J. H. Low, by her last will bequeathed to them the places "The Hope" and "Groenfontein" for the sum of £825, under condition "that neither of them should sell or exchange his share thereof to or with a stranger unless he shall have first obtained his brother's consent thereto in writing; or if the brother do not consent thereto, but choose to take over the share of him who wishes to dispose of it, the latter shall not be entitled to ask more for it than the amount which he had, as before stated, paid for said share, viz., £412 10*s.*"

These places were duly transferred on the 9th November, 1841, by the executor of the Widow Low, to defendant and his brother, under the conditions prescribed in the said will.

On the 5th January, 1842, the defendant and his brother having estimated that the proportion of the said sum of

£825 corresponding to the value of "The Hope" was £471, and that of "Groenfontein" was £354, the defendant sold his half of "Groenfontein" to his brother, in compliance with the condition in the will, for £177, being the half of £354, the estimated value thereof.

In 1840 J. H. Low bought the places "Drooge River" and "Wilgeboom" for £563 5*s*.

Cloete, for defendant, argued that, although A and B might have, on the same day, entered into a transaction by which they were respectively to transfer to each other their places, A C and B D, in consideration of the same amount to be paid to each, and, *a fortiori*, where the amounts were different, it did not necessarily follow that the transaction should in law be deemed to be a contract of exchange, and not two distinct contracts of sale, even although the result might be that when they came to a settlement no money would pass between them, when the amounts stipulated had been the same, and when such amounts had been different, only the amount of the difference would pass between them in money; and put several cases to illustrate this position; and maintained that, under all the circumstances of this case, what took place between the parties must be deemed in law not to have been one contract of exchange, but two distinct contracts of sale of their respective places. That the proclamation of the 2nd January, 1818, imposed a transfer duty on the amount only of the price actually stipulated for and received by the seller, without reference to whether such price was equal to the full value of the property or not, except where it could be shown that the transaction was not a *bonâ fide* sale, but a pretended sale to cover a gift of the whole or part of the property pretended to be sold. And that, accordingly, if defendant had sold his half of "The Hope" to his brother under the conditions of their mother's will for £235 10*s*., being the half of the value at which "The Hope" was estimated in the said will, transfer duty would by law be due only on this sum of £235 10*s*., although the actual and real value of one half of "The Hope" might be £812 10*s*. Consequently, that if £325 were truly the amount of the price paid by defendant for "Drooge River" and "Wilgeboom" he was only liable to pay transfer duty, as he had done, on that sum, notwithstanding the actual value might be £500, as appraised by Du Toit.

But the Court held that the transaction between the parties was a contract of exchange; and, therefore, that defendant was liable to pay transfer duty on the appraised value of "Drooge River" and "Wilgeboom," which they found to be £500,—thus making the amount of the duty

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£20. And as it was admitted that defendant had already paid £13 on account of the transfer duty, they gave judgment for the balance, being £7, with costs.

The Court found that, as the Government advertisement of the 6th September, 1838, has not the effect of law, the plaintiff's claim for penalties, in so far as founded on it, must be rejected; and that, although the penalty claimed in the declaration is precisely of the same amount as that to which, under the circumstances of the present case, the defendant would be liable under the proclamation of the 2nd January, 1828, yet that the plaintiff cannot in this action recover that penalty, seeing that his declaration contains no proper and sufficient claim for such penalty; because the words "has become liable and indebted to the Colonial Government, over and above the transfer duty of four per cent., the full fine of eight per cent.," must be held to mean the fine of eight per cent. previously alleged, as being imposed by and exigible under the said Government advertisement; and because, even if every part of the declaration relating to the said Government advertisement were held to have been expunged from the record, these words would not sufficiently express the ground of the plaintiff's demand for, and of defendant's liability to, such "full fine of eight per cent.," as to entitle plaintiff to recover it under his declaration as framed.

MANUEL'S TRUSTEE *vs.* NORDEN.

Civil imprisonment. Contempt of Court. Compensation. Insolvency, meeting in. Arbitration. Ord. 6, 1843, § 97. *Trustee, power of.*

Where a judgment of the Court condemning a defendant, ad præstandum factum, is unfulfilled, how civil imprisonment may competently be applied for.

Where the proper form of application for a decree is by motion, and a summons has been issued instead, it is competent nevertheless to make the motion, as the summons must be held equivalent to a notice of the motion.

It is incompetent, in answer to a liquid claim based on a judgment of the Court, to oppose a plea of compensation founded on an illiquid counter claim for damages, which claim both plaintiff and defendant have agreed to refer to arbitration.

A trustee must give specific notice in his advertisement calling a meeting of creditors to consider proposals for arbitration, of the special object of such meeting.

1845. July 12. — Manuel's Trustee vs. Norden.

Brand, for plaintiff, put in the judgment of the Court of the 3rd December, 1844, in the cause between the parties.

"Judgment for plaintiff for £541 13*s.* 4*d.*, and interest *a tempore moræ*, viz., 12th April, 1844, less the sum of £57 11*s.* 9*d.*, and interest *a tempore moræ*, viz., 26th May, 1844, and further do adjudge and decree that each party do pay their own costs of suit, and that the defendant do receive transfer, and fulfil the conditions as prayed by the plaintiff in his declaration."

2nd. The following document:

"I, J. S. Merrington, of Cape Town, &c., notary public, do hereby certify that, on the 21st of April, 1843, I attended at the office of the Registrar of Deeds, pursuant to the notice herein contained, accompanied by F. G. Watermeyer, the duly authorized agent of the trustee in the insolvent estate of Isaac Manuel, for the purpose of passing transfer to B. Norden of the landed property mentioned in said notice, and that the said B. Norden attended at the said time and place, and tendered the sum of £205 to cover the second instalment of the purchase money of the said landed property, with interest to that day, less the sum of £400 damages claimed by him, which damages he alleged the creditors in the said estate had agreed to refer to arbitration. He declared himself ready to proceed, and also to give security to the satisfaction of the trustee, for the payment of the difference of the reduced amount of damage (if any) and the said sum of £400, and upon these terms agreed to take transfer, but the said agent refused the said tender as being insufficient.

"As witness my hand, &c.,

"12th July, 1845.

"J. SAML. MERRINGTON,
Notary Public.

"Witness: J. ALFRED MERRINGTON."

The notice referred to in and annexed to the above notarial certificate, dated 17th April, 1845, notified to the defendant to attend at the office of the Registrar of Deeds on the 21st April, 1845, to receive transfer from the plaintiff of the property in question, and to get him with his sureties to sign the necessary mortgage bonds, and was signed by Merrington & Son, attorneys for the trustee.

1845. July 12.

Manuel's Trustee vs. Norden.

Brand then stated that, in consequence of the defendant's continuing to refuse to perform the judgment of the Court, except in the manner and to the extent tendered by him as aforesaid, the plaintiff had been compelled to take out and serve on him the summons now on the roll. (Which commanded the defendant to obey and perform the said judgment of the 3rd December, 1844, whereby he was condemned to fulfil the conditions of sale therein mentioned, by accepting transfer of the premises in question, and passing a mortgage bond for the two last instalments of the purchase money, amounting to £1,083 6*s.* 8*d.*, or by paying one of the said instalments which has become due since the date of the said judgment, and to pass a mortgage bond for the other, which judgment the defendant has refused to perform, and unless he should do so, summoned the defendant to plead to the provisional claim of the plaintiff for a decree of civil imprisonment, to have effect until he shall have performed the said judgment.)

Cleote, for the defendant, first maintained that the summons for civil imprisonment for non-performance of the judgment of the Court was an incompetent proceeding; and that the application of the plaintiff truly resolved itself into an application to have the defendant imprisoned for a contempt of Court, which application could only competently be made by motion, and not by summons placed on the provisional roll.

The Court overruled this objection, holding that a decree of civil imprisonment, *ad præstandum factum*, ordered by a previous judgment of the Court to be performed by the defendant, might competently be applied for by a summons in the form of that with which the defendant had been served, and that even if the proper form of application for such decree were by motion, it would be competent for the plaintiff now to make such a motion, as the summons must be held equivalent to a notice of the motion.

Cleote then produced an affidavit, sworn by the defendant, in which, *inter alia*, he stated that in the action against him, in which the judgment of the 3rd December had been given, he had claimed a set-off or compensation for certain alleged damages sustained by reason of the plaintiff having refused to fulfil the contract and pass transfer of the said property. That on the trial of the said action, the defendant withdrew this claim on an understanding between the respective counsel, and also between him and the plaintiff, that the said claim should be settled out of Court between themselves. And that, in pursuance of this arrangement, the plaintiff, on the 20th December last, advertised a meeting of the creditors of the insolvent, to be holden on the 22nd January

1844.
Aug. 28.
„ 29.

Hill vs. Curlewis and Brand.

This action was brought by Capt. Hill, Resident Magistrate of Malmesbury, to recover from the defendants £200, as damages for and on account of a false, scandalous, malicious, and defamatory libel contained in the following letter, of which the defendant Curlewis was the writer, and which was published in the *Zuid-Afrikaan* newspaper, of which the defendant Brand was the editor.

[Here the letter, which was a clear libel, was set out at length. It in substance averred that plaintiff, who, as magistrate, was on the Licensing Board, had, from private motives, withheld a licence, for which defendant Curlewis had applied; and, secondly, that while a licence had previously been granted to Curlewis, while in treaty for the purchase of a house of plaintiff, on the completion of the sale the licence had been refused to Curlewis and granted to other friends of plaintiff.]

The defendant Curlewis did not plead the general issue, but admitting that he wrote and caused to be published in the *Zuid-Afrikaan* the alleged defamatory libel, as fully set out in the declaration, denied that the plaintiff was entitled to claim any damages by reason of the said publication, because the contents of the alleged libel are true; and then proceeded to allege facts in justification, having reference solely to that part of the letter which related to the withholding the licence, without taking any notice of that part which related to the sale of plaintiff's house to defendant.

The defendant Brand, for plea, admitted the publication of the alleged libel in the *Zuid-Afrikaan* newspaper, and that he was and still is the editor thereof; but denied that he had any malicious intent or object in the said publication, and averred that the alleged libel was published through his neglect in not properly perusing its contents. And, admitting his liability as such editor, the defendant pleaded in further mitigation of the matter, that at the time of the publication of the alleged libel, he was, and still is, a gratuitous editor of the said paper, receiving no emolument as such, or for the publication of the said alleged libel. Wherefore he prayed judgment if the said plaintiff ought to have or maintain his aforesaid action to recover from him the amount of damages claimed.

In replication the plaintiff, as to the plea of Brand, pleaded that he ought not, by reason of anything in that plea alleged, to be barred from recovering from him the amount of damages claimed; and referred the amount of damages which he ought to recover, to the judgment of the Court; and, as to the plea of Curlewis, pleaded that he ought not, by anything contained in it, to be barred from maintaining his action against the said defendant, because

1844. Aug. 28. „ 29. Hill vs. Curlewis and Brand.

the said plea, although it purports to justify the whole of the alleged libel, states only matter sufficient to justify a part of said libel, even supposing the whole of the matter in the said plea alleged to be true; and because he denies the truth of the whole and every part of the said last-mentioned matter. Wherefore he joined issue generally with the defendant upon the said plea; and, submitting that it is but a plea to part only of the declaration, and must be so construed, referred all questions, as well of law as of fact, and whether arising upon the pleadings in this case or to be determined by proofs to be produced, to the judgment of the Court.

After the pleadings had been opened, the Court expressed their opinion that the letter complained of contained two distinct charges against plaintiff, both of which, if false, were libellous. That the matter pleaded in justification was only sufficient to justify the charge in the first branch of the libel, and had no application to the second. That the defendant, by admitting the writing and publishing of the letter, "as set out in the declaration," having admitted writing and publishing the allegations in the second branch, his plea was defective, seeing that he neither admitted nor denied the conclusions in fact or in law founded by plaintiff on the allegations in the second branch, nor attempted to justify them. And that, if objected to by the plaintiff, the Court would have ordered the defendant in so far to amend his plea; but as the defendant's counsel stated that he had drawn the plea in its present form owing to a misapprehension of the principle of the rules of pleading as now established in England, under which he had considered he would be entitled to argue that those allegations were not libellous or actionable; and as the plaintiff's counsel stated that, in order to avoid delay, the plaintiff was willing to allow defendant under the present pleadings to maintain and argue that point, the Court allowed the case to proceed. The defendant Curlewis called witnesses to support his plea of justification, but completely failed in doing so. After which the Court adjourned.

This day (August 29, 1844), the *Attorney-General* was heard on the evidence for the plaintiff, and *Cloete* for the defendant Curlewis.

Brand, for himself, merely repeated the averments in his plea, without any explanation as to the cause or nature of his "neglect in not properly perusing the contents" of the libel before publishing it, and without expressing any acknowledgment of the falsehood of the libel, or any regret or apology for having published it.

1844.
Aug. 28.
„ 29.

Hill *vs.* Curlewis and Brand.

Judgment for plaintiff. Damages £50 against Curlewis; damages £50 against Brand; with costs against defendants both jointly and severally.

In giving judgment, it was stated by the Court that to sustain the averments made in the plea for the defendant Brand, either as an absolute defence against the action or even in mitigation of damages, wholly unsupported as they were by any evidence whatever, and without explanation, much less proof, of the cause or nature of his neglect in properly perusing the contents of the libel before publishing it, would be to lay down a principle which would completely destroy all responsibility of editors of newspapers for libels published by them in their papers; and that, considering that this defendant had neither expressed any acknowledgment of the falsehood of the libel he had published, nor any regret or apology for having published it, nor made nor offered any atonement of any kind for the injury occasioned to the plaintiff by the publication of the libel, there was no ground for making any distinction between him and the author of the libel in awarding damages.

Civil Commissioner of Clanwilliam *vs.* G. Low.

Transfer duty on exchanged estates.

Aug. 30.

Civil Commissioner of Clanwilliam *vs.* G. Low.

This action was brought in the Circuit Court of Clanwilliam. The declaration set forth that the defendant, on the 2nd May, 1842, entered into a bargain with J. H. Low, whereby the defendant exchanged with, and engaged himself to transfer, his half share of the place "The Hope," to the said J. H. Low, for and in consideration of the places "Drooge River" and "Wilgeboom," which places the said J. H. Low exchanged with, and engaged to transfer to, the defendant.

That by the proclamation of 2nd January, 1818, a transfer duty of four per cent. is imposed on the value of all estates changing proprietors, without sale, by exchange, which value is directed by said proclamation to be ascertained upon oath, by competent persons to be appointed by the magistrate of the district in which such estates are situated.

That in compliance with, and in terms of said proclamation, the value of the said places "Drooge River" and "Wilgeboom" has, by a competent person duly appointed by plaintiff for that purpose, been duly appraised at, and ascertained to be, £500; on which amount the defendant

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became liable and indebted to the Colonial Government in a transfer duty of four per cent., which by said proclamation is directed to be paid within six months from the date of the transaction by which the said estates were exchanged.

That by the Government advertisement of the 6th September, 1838, certain fines and penalties have been imposed in lieu of certain other fines and penalties fixed by the proclamation of 2nd January, 1818, on parties taking in exchange any estate, on their failing to pay the said transfer duty within six months; which fines and penalties are to be paid at the same time with, and over and above, the said transfer duty of four per cent., and *inter alia*, for a delay above five months, and not exceeding six months, a fine or penalty of eight per cent.

That the defendant having failed to pay to Government the said transfer duty on the said places "Drooge River" and "Wilgeboom," within six months from 2nd May, 1842, when the exchange thereof took place, and within six months subsequent to the expiration of the said first six months, the defendant, who has actually received transfer of the said places, but without paying the duty properly payable thereon, has become liable and indebted to the Colonial Government, over and above the transfer duty of four per cent., the full fine of eight per cent., or in all twelve per cent. on £500, being the appraised and real value of the said places, namely, in the sum of £60, together with the further sum of £4 12*s.* 3*d.*, being the expenses incurred in making the appraisement.

The defendant pleaded the general issue.

The cause was, by consent, removed to the Supreme Court.

The following facts were proved by the said evidence, or admitted by the parties:—

The Widow Low, mother of the defendant, and of his brother, J. H. Low, by her last will bequeathed to them the places "The Hope" and "Groenfontein" for the sum of £825, under condition "that neither of them should sell or exchange his share thereof to or with a stranger unless he shall have first obtained his brother's consent thereto in writing; or if the brother do not consent thereto, but choose to take over the share of him who wishes to dispose of it, the latter shall not be entitled to ask more for it than the amount which he had, as before stated, paid for said share, viz., £412 10*s.*"

These places were duly transferred on the 9th November, 1841, by the executor of the Widow Low, to defendant and his brother, under the conditions prescribed in the said will.

On the 5th January, 1842, the defendant and his brother having estimated that the proportion of the said sum of

£825 corresponding to the value of "The Hope" was £471, and that of "Groenfontein" was £354, the defendant sold his half of "Groenfontein" to his brother, in compliance with the condition in the will, for £177, being the half of £354, the estimated value thereof.

In 1840 J. H. Low bought the places "Drooge River" and "Wilgeboom" for £563 5*s*.

Cloete, for defendant, argued that, although A and B might have, on the same day, entered into a transaction by which they were respectively to transfer to each other their places, A C and B D, in consideration of the same amount to be paid to each, and, *a fortiori*, where the amounts were different, it did not necessarily follow that the transaction should in law be deemed to be a contract of exchange, and not two distinct contracts of sale, even although the result might be that when they came to a settlement no money would pass between them, when the amounts stipulated had been the same, and when such amounts had been different, only the amount of the difference would pass between them in money; and put several cases to illustrate this position; and maintained that, under all the circumstances of this case, what took place between the parties must be deemed in law not to have been one contract of exchange, but two distinct contracts of sale of their respective places. That the proclamation of the 2nd January, 1818, imposed a transfer duty on the amount only of the price actually stipulated for and received by the seller, without reference to whether such price was equal to the full value of the property or not, except where it could be shown that the transaction was not a *bonâ fide* sale, but a pretended sale to cover a gift of the whole or part of the property pretended to be sold. And that, accordingly, if defendant had sold his half of "The Hope" to his brother under the conditions of their mother's will for £235 10*s*., being the half of the value at which "The Hope" was estimated in the said will, transfer duty would by law be due only on this sum of £235 10*s*., although the actual and real value of one half of "The Hope" might be £812 10*s*. Consequently, that if £325 were truly the amount of the price paid by defendant for "Drooge River" and "Wilgeboom" he was only liable to pay transfer duty, as he had done, on that sum, notwithstanding the actual value might be £500, as appraised by Du Toit.

But the Court held that the transaction between the parties was a contract of exchange; and, therefore, that defendant was liable to pay transfer duty on the appraised value of "Drooge River" and "Wilgeboom," which they found to be £500,—thus making the amount of the duty

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£20. And as it was admitted that defendant had already paid £13 on account of the transfer duty, they gave judgment for the balance, being £7, with costs.

The Court found that, as the Government advertisement of the 6th September, 1838, has not the effect of law, the plaintiff's claim for penalties, in so far as founded on it, must be rejected; and that, although the penalty claimed in the declaration is precisely of the same amount as that to which, under the circumstances of the present case, the defendant would be liable under the proclamation of the 2nd January, 1828, yet that the plaintiff cannot in this action recover that penalty, seeing that his declaration contains no proper and sufficient claim for such penalty; because the words "has become liable and indebted to the Colonial Government, over and above the transfer duty of four per cent., the full fine of eight per cent.," must be held to mean the fine of eight per cent. previously alleged, as being imposed by and exigible under the said Government advertisement; and because, even if every part of the declaration relating to the said Government advertisement were held to have been expunged from the record, these words would not sufficiently express the ground of the plaintiff's demand for, and of defendant's liability to, such "full fine of eight per cent.," as to entitle plaintiff to recover it under his declaration as framed.

MANUEL'S TRUSTEE *vs.* NORDEN.

Civil imprisonment. Contempt of Court. Compensation. Insolvency, meeting in. Arbitration. Ord. 6, 1843, § 97. *Trustee, power of.*

Where a judgment of the Court condemning a defendant, ad præstandum factum, is unfulfilled, how civil imprisonment may competently be applied for.

Where the proper form of application for a decree is by motion, and a summons has been issued instead, it is competent nevertheless to make the motion, as the summons must be held equivalent to a notice of the motion.

It is incompetent, in answer to a liquid claim based on a judgment of the Court, to oppose a plea of compensation founded on an illiquid counter claim for damages, which claim both plaintiff and defendant have agreed to refer to arbitration.

A trustee must give specific notice in his advertisement calling a meeting of creditors to consider proposals for arbitration, of the special object of such meeting.

1845. July 12. — Manuel's Trustee vs. Norden.

Brand, for plaintiff, put in the judgment of the Court of the 3rd December, 1844, in the cause between the parties.

"Judgment for plaintiff for £541 13*s.* 4*d.* and interest *a tempore moræ*, viz., 12th April, 1844, less the sum of £57 11*s.* 9*d.*, and interest *a tempore moræ*, viz., 26th May, 1844, and further do adjudge and decree that each party do pay their own costs of suit, and that the defendant do receive transfer, and fulfil the conditions as prayed by the plaintiff in his declaration."

2nd. The following document:

"I, J. S. Merrington, of Cape Town, &c., notary public, do hereby certify that, on the 21st of April, 1843, I attended at the office of the Registrar of Deeds, pursuant to the notice herein contained, accompanied by F. G. Watermeyer, the duly authorized agent of the trustee in the insolvent estate of Isaac Manuel, for the purpose of passing transfer to B. Norden of the landed property mentioned in said notice, and that the said B. Norden attended at the said time and place, and tendered the sum of £205 to cover the second instalment of the purchase money of the said landed property, with interest to that day, less the sum of £400 damages claimed by him, which damages he alleged the creditors in the said estate had agreed to refer to arbitration. He declared himself ready to proceed, and also to give security to the satisfaction of the trustee, for the payment of the difference of the reduced amount of damage (if any) and the said sum of £400, and upon these terms agreed to take transfer, but the said agent refused the said tender as being insufficient.

"As witness my hand, &c.,

"12th July, 1845.

"J. SAML. MERRINGTON,
Notary Public.

"Witness: J. ALFRED MERRINGTON."

The notice referred to in and annexed to the above notarial certificate, dated 17th April, 1845, notified to the defendant to attend at the office of the Registrar of Deeds on the 21st April, 1845, to receive transfer from the plaintiff of the property in question, and to get him with his sureties to sign the necessary mortgage bonds, and was signed by Merrington & Son, attorneys for the trustee.

1845. July 12. — Manuel's Trustee vs. Norden.

Brand then stated that, in consequence of the defendant's continuing to refuse to perform the judgment of the Court, except in the manner and to the extent tendered by him as aforesaid, the plaintiff had been compelled to take out and serve on him the summons now on the roll. (Which commanded the defendant to obey and perform the said judgment of the 3rd December, 1844, whereby he was condemned to fulfil the conditions of sale therein mentioned, by accepting transfer of the premises in question, and passing a mortgage bond for the two last instalments of the purchase money, amounting to £1,083 6*s.* 8*d.*, or by paying one of the said instalments which has become due since the date of the said judgment, and to pass a mortgage bond for the other, which judgment the defendant has refused to perform, and unless he should do so, summoned the defendant to plead to the provisional claim of the plaintiff for a decree of civil imprisonment, to have effect until he shall have performed the said judgment.)

Cleote, for the defendant, first maintained that the summons for civil imprisonment for non-performance of the judgment of the Court was an incompetent proceeding; and that the application of the plaintiff truly resolved itself into an application to have the defendant imprisoned for a contempt of Court, which application could only competently be made by motion, and not by summons placed on the provisional roll.

The Court overruled this objection, holding that a decree of civil imprisonment, *ad præstandum factum*, ordered by a previous judgment of the Court to be performed by the defendant, might competently be applied for by a summons in the form of that with which the defendant had been served, and that even if the proper form of application for such decree were by motion, it would be competent for the plaintiff now to make such a motion, as the summons must be held equivalent to a notice of the motion.

Cleote then produced an affidavit, sworn by the defendant, in which, *inter alia*, he stated that in the action against him, in which the judgment of the 3rd December had been given, he had claimed a set-off or compensation for certain alleged damages sustained by reason of the plaintiff having refused to fulfil the contract and pass transfer of the said property. That on the trial of the said action, the defendant withdrew this claim on an understanding between the respective counsel, and also between him and the plaintiff, that the said claim should be settled out of Court between themselves. And that, in pursuance of this arrangement, the plaintiff, on the 20th December last, advertised a meeting of the creditors of the insolvent, to be holden on the 22nd January

last, "for the purpose of considering a claim for damages, asserted by Mr. B. Norden in respect of certain landed property bought by him from the agent of the insolvent, and for the purpose of instructing the trustee thereon." And that at this meeting of the creditors, held before the Master on the 22nd January (as appeared from the minutes of said meeting), "it was resolved by the undersigned creditors then present that the claim of damage of Mr. B. Norden be referred to arbitration." Signed, W. Corbitt, J. Jearey.

That, in consequence, the plaintiff and deponent had named their referees, and given joint instructions to Mr. Attorney Merrington to prepare the necessary act of submission, but that it was not prepared in consequence of Mr. Watermeyer, on behalf of some of the creditors, stating that they would not consent to the said claim being referred to arbitration.

That thereafter he had, at the office of the Registrar of Deeds, made the tender specified in the above notarial certificate; and that the defendant had always been ready, and has never refused to comply with the judgment of the said Court.

On these grounds, *Cloete* contended that the tender made was a sufficient tender, and that the plaintiff's summons should be dismissed with costs.

But the Court held that the defendant's claim for damages was an illiquid one, even although it had duly been referred to arbitration by the parties, and that the proceedings in the arbitration were going on, and therefore could not be pleaded in bar of, or as a set-off, or in compensation against the plaintiff's liquid claim, in virtue of the judgment of 3rd December, 1844. And, further, that in respect of the provisions of the 97th section of Ordinance No. 6, 1843, the plaintiff could not, as trustee, legally, and so as to bind the creditors of the insolvent, submit, or enter into any agreement for submitting, the defendant's claim for damages to arbitration unless he had given previous notice of the intention to submit the said claim to arbitration for twenty-eight days, by advertisement in the *Government Gazette*. And that the notice which had been published in the *Gazette* of the 20th December, inasmuch as it made no mention of any intention to submit defendant's claim to arbitration, was not a sufficient compliance with the requisites of the said Ordinance.

On these grounds, the Court condemned the defendant to perform and fulfil the judgment of the 3rd December, 1844, within eight days from this date, with costs.

The Court, however, held that, under the circumstances of the case, the defendant could not as yet be considered as in contempt of Court for not performing the said judgment.

KILIAN & STEIN *vs.* NORDEN, EXECUTOR OF HORN.

Exceptio non qualificatæ. Power of attorney. Rule of Court No. 8. Partnership.

When A. B. grants to C. D. a power to commence legal proceedings, and C. D. gives to an attorney of the Court a warrant to sue, summons is good if issued in the name of A. B. alone, without mention of C. D.

After dissolution of partnership no partner can legally grant a valid power of attorney, in the name of the firm, to collect firm debts, unless specially authorized by deed of dissolution, or other deed of other partner.

No authority to institute an action which was not made known to a defendant who files an exception of non-qualification before he filed his exception, or at least before the plaintiff files his answer thereto, can be pleaded in answer to such exception.

1845. Aug. 7. „ 12. „ 14.

Kilian & Stein vs. Norden, Executor of Horn.

In this case, the warrant to sue, filed by the plaintiffs' attorney in terms of the 8th rule of Court on taking out the summons, was as follows :—

"We, the undersigned, in our capacity as the duly qualified agents of Gabriel Kilian and Louis Stein, formerly trading at Cape Town under the style or firm of Kilian & Stein, do hereby ordain, nominate, and appoint John Reid, of Cape Town, attorney-at-law, to be our lawful attorney and agent, for them, the said G. Kilian and L. Stein, formerly trading as aforesaid, and in their name, to institute proceedings of claim and demand against Benjamin Norden, of Cape Town, in his capacity as executor testamentary of the late Abraham Horn, for recovery of, &c., promising to approve, &c.

"Given under our hand at Cape Town, 3rd of June, 1845.

(Signed) "VENNING, BUSK, & Co.,

p. pro KILIAN & STEIN.

"EDW. J. JERRAM."

The summons commanded the said B. Norden, in his said capacity,

"To render to Gabriel Kilian and Louis Stein, of Frankfort-on-the-Maine, formerly trading at Cape Town under the style or firm of Kilian & Stein, the sum of," &c.

The declaration set forth that—

"B. Norden, executor, &c., of the late A. Horn (the defendant in this suit), has been summoned to answer G. Kilian and L. Stein, lately trading at Cape Town under the style and firm of Kilian & Stein (the plaintiffs in this suit), in an action of debt, and thereupon the said plaintiffs, by John Reid, their attorney, complain," &c.

Neither the summons nor the declaration made any mention whatever of Venning, Busk, & Co., or of Edward J. Jerram.

The schedule of documents annexed to the declaration, in terms of the 132nd Rule of Court, specified, *inter alia* :—

1.—Power of attorney by Kilian & Stein, in favour of Venning, Busk, & Co., dated 19th July, 1843.
2.—Power of substitution by Venning, Busk, & Co., in favour of E. J. Jerram, and dated 6th April, 1844.
3.—Deed of co-partnership between G. Kilian and L. Stein, dated 4th June, 1839.
4.—Contract between Kilian & Stein and Abraham Horn and Nathan Birkenruth, dated 5th June, 1839, &c., &c.
5.—Deed of dissolution of partnership of the firm of Kilian & Stein, dated 27th June, 1843, &c.

After the declaration was filed, the defendant applied for and obtained, in terms of said rule 132, inspection of the above-mentioned documents, or at least of Nos. 1, 2, and 5.

Thereafter the defendant filed an exception, in which he excepted to the form of the present action, and the qualification of the parties by whom the same has been brought, because the present action has been instituted by E. J. Jerram, as one of the partners of the firm of Venning, Busk, & Co., styling themselves the duly qualified agents of the said G. Kilian and L. Stein, and because the said firm of Venning, Busk, & Co. is not duly qualified by the said Kilian & Stein to bring the present action against the defendant. Whereupon he prayed that the said plea of non-qualification may be admitted as against the parties who have brought the present action; and that the defendant may be absolved from this instance.

The schedule of documents annexed to the exception specified, *inter alia*, expressly Nos. 1 and 5 of the documents scheduled by the plaintiff. Also a letter from Kilian & Stein addressed to Messrs. Horn and Birkenruth, dated 19th July, 1843. And generally the other documents scheduled by the plaintiffs.

To the above exception the plaintiffs answered that the firm of Venning and Busk is duly qualified to bring the

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present action; whereupon they prayed that the defendant be ordered to plead to the merits of the said action.

Postea (12th August, 1845).—This day, in support of the title to bring the action, the following documents were put in on the part of the plaintiffs:—

1st. A notarial power of attorney, setting forth that—

"We, the undersigned, commit full power and authority unto Messrs. Venning, Busk, & Co., in Cape Town, respective Mr. Joseph Busk at that place, partner and representative of that firm, or the person or persons who shall otherwise at that place represent the said firm on behalf and in name of the undersigned, to collect all our demands and claims outstanding in Cape Town or elsewhere at the Cape of Good Hope, to receive moneys, &c., and to pass full receipts for the same, and grant acquittals for any debt; to compound, &c., &c.; and all this in court as well as thereout, personally or by substituted agents, &c., &c.; and for that purpose to appoint attorneys-at-law, and supply them with powers of attorney, &c., promising to ratify whatever our said attorneys shall do in the premises," &c.

This deed then contained the following clauses:—

"In witness whereof we have subscribed these presents. Done at Frankfort-on-the-Maine, the 19th of July, 1843.

"KILIAN & STEIN."

"I certify, as desired, that Mr. Louis Stein, partner of the house of trade of Kilian & Stein, of this place, has, in my presence, acknowledged the contents of this power of attorney, and subscribed the same with his own hand.—Done at Frankfort-on-the-Maine, the 17th August, 1843.—(Signed) Dr. J. V. Boegner, notary public of the Free Town of Frankfort (and sealed with his notarial seal)."

Defendant admitted that the signature "Kilian & Stein" was signed by the hand of Stein.

2nd. A power of attorney, executed before Mr. Reid, notary public at Cape Town, on the 6th April, 1844, by Joseph Busk, as one of the partners of the firm of Messrs. Venning, Busk, & Co., whereby, after reciting the above power of attorney by Kilian & Stein in favour of Venning, Busk, & Co., he substituted and appointed E. J. Jerram, &c., in his place and stead, to act as and be the attorney of the said G. Kilian and L. Stein, heretofore trading as aforesaid, &c., &c., in all the matters and things in said last-mentioned power of attorney set forth.

3rd. The deed of dissolution of the partnership of Kilian & Stein, executed before the said notary public Boegner, at Frankfort, on the 27th June, 1843, by B. B. Eskeles, as attorney of his son-in-law, the said G. Kilian, in virtue of a legal power of attorney to that effect by him produced, and by Louis Stein personally, which contained, *inter alia*, clauses to the following effect:—

"Whereas Mr. Gabriel Kilian and Mr. Louis Stein have agreed to dissolve the co-partnership of Kilian & Stein, they have concluded between them to the following effect:—

"Sec. 1. Neither of the late partners is entitled henceforth on behalf of the house or in the name of the firm to make purchases or consignments, to contract loans, to accept bills of exchange, or sign obligations, and they are permitted to sign in the name of Kilian & Stein only in so far as is required towards its liquidation. The branch house in Cape Town, Cape of Good Hope, continues to exist on mutual account (according to section 4) until the separation shall have been there effected.

"Sec. 3. The division, dissolution, and liquidation of the branch business established in Cape Town shall take place without delay, for which purpose the two partners shall have to proceed thither, either personally, and take their departure to that place within the month of July of the present year, or else provide some one else with adequate powers of attorney, which powers of attorney must in like manner be completed and transmitted to that place within the said month of July of the present year. Each party shall have to be made acquainted with the names of the attorneys respectively, and their appointment shall be made known to the managers in Cape Town.

"Directions shall, however, be transmitted to the present managers at that place, Mr. A. Horn and Mr. N. Birkenruth, by means of a written communication to be sent out from here under this day's date, and in the name of the firm of Kilian & Stein, to continue to sell off the goods at adequate prices, to grant no unusual and too extensive credits, and generally as regards the business, and in respect of the remittances and returns, to continue acting as heretofore, and to direct and transmit letters and remittances and returns, as hitherto done, only to Messrs. Cahlman Brothers, in London, on account of the firm, until Mr. G. Kilian and Mr. L. Stein shall either appear there personally, or that their powers of attorney shall have arrived there, and that the attorneys nominated and appointed by the one and the other of the partners shall have made their appearance.

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"Sec. 4. So soon as Mr. G. Kilian or Mr. L. Stein, or an attorney of the one or the other of them, shall be present at the counting-house of or with the managers in Cape Town, all sales of goods in Cape Town, &c., shall absolutely cease. And the managers there will have to attend to the instructions of their employées, or their attorneys respectively, in respect of the dissolution and liquidation of the business there, and shall assist towards it to the best of their power, to which effect they shall also be instructed in the letter to be addressed to them according to section 3.

"The dissolution of the business there shall be effected in the manner that the goods on hand at the time in Cape Town and Graham's Town shall be equally divided, according to quality and quantity, between Mr. G. Kilian and Mr. L. Stein, with the exception, &c. (here certain provisions were made as to particular goods, which it is unnecessary to refer to).

"For the value of the goods so awarded to both the partners, each of them shall be debited in his account proper. The outstanding claims of the partnership shall be collected on joint account, and be remitted in bills on London to this place, under cover of Messrs. Kilian & Stein, to be forwarded through Messrs. Cahlman Brothers in London, in manner as is here below in section 6 directed.

"Messrs. Venning, Busk, & Co., at the Cape of Good Hope, shall be empowered to collect these outstanding claims, who shall have to be supplied with joint instructions for that purpose, in manner as is hereinbefore agreed upon, provided that both the partners shall not consider it advisable to entrust the collection thereof to their joint attorneys at the Cape.

"Sec. 6. The house of Messrs. Cahlman Brothers, in London, shall be mutually employed to transmit all letters from Cape Town or elsewhere, addressed to the firm of Kilian & Stein, unopened and under cover, to Messrs. Beyfurz Brothers, of this place, on behalf of the partnership, &c.

"Sec. 7. Messrs. Beyfurz Brothers shall be empowered by both partners to give over the remittances which shall be so sent in to them, only to both the partners jointly (or their attorneys).

"All remittances which shall be received shall be employed, however, in the first place towards the liquidation of the claims of all the creditors of the firm, of whom a specific list is subjoined to this deed of dissolution; and only after the whole of them shall have been fully paid for, principal as well as interest, a division of the balance shall

take place between the partners *pro rata* of their respective capital and stock."

4th. The plaintiff next put in a letter dated Frankfort, 27th June, 1843, signed "Kilian & Stein," and addressed to Mr. Horn and Mr. Birkenruth, which was produced by the defendant, and the signature to which was admitted by defendant to have been signed by the hand of Stein, giving them the directions specified in the third section of the deed of dissolution, and informing them that they would delegate attorneys to act for them in the dissolution and division of the estate, and to collect the outstanding debts.

5th. A notarial power of attorney executed at Frankfort on the 15th July, 1844, by G. Kilian, appointing Mr. H. Oppenheimer to be his general and special attorney to manage and settle all his affairs at the Cape of Good Hope, and more particularly to represent him in every respect relating to the dissolved firm of Kilian & Stein; to receive for him and to give quittance for any goods, moneys, &c., &c., to co-operate in the inspection and copying of the books, to negotiate with, or, in case of need, to institute judicial proceedings against the former agents of the firm of Kilian & Stein, Mr. A. Horn and Mr. N. Birkenruth conjointly, or against each in particular, especially against Mr. Horn, relative to the delivery of the moneys still on hand and belonging to the firm of Kilian & Stein, whether jointly with my partner, Mr. Louis Stein, or his attorney, or alone; and also, to carry on business for him in the Colony of the Cape of Good Hope, with power of substitution, and also revoking a power of attorney granted by him at London on the 25th July, 1843, to Mr. M. Eskeles, and the power of attorney jointly granted by him to the said Eskeles and Mr. Oppenheimer on the 11th July, 1843.

6th. A notarial act executed by the said Oppenheimer at Cape Town on the 7th August, 1845, which recited that the present action had been instituted by E. J. Jerram, as representing Venning, Busk & Co., referred to the power of attorney in favour of Venning & Busk, signed "Kilian & Stein," and declared that previously to the commencement of the said action, he, Oppenheimer, in his capacity of attorney of Kilian, had authorized Jerram to institute this action.

Plaintiff closed his case.

The defendant called no evidence.

The *Attorney-General* and *Cloete*, for the defendant, quoted *Harrison* vs. *Jackson*, 1 *Term Reports*, *p.* 207, to show that by the law of England, even during the subsistence of a partnership, one partner, unless specially authorized by his partner by deed, cannot execute any document which is a deed; and, from this, argued that by the law of this Colony

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one partner during the subsistence of the partnership cannot, by signing a power of attorney with the signature of the firm, bind his partner so as to authorize the person to whom the power was granted to act as the attorney of the partnership, and bind it in any way, even in matters belonging to the partnership. Next, he commented on the deed of dissolution, and maintained that the clause at the end of section 4, in which mention is made of Venning & Busk, gave them no power whatever, *de præsenti*, to do anything. And, secondly, even if it did give them power to collect certain outstanding claims, it was only such claims as were mentioned in the preceding paragraph, which were of an entirely different nature from the claims in the declaration. Thirdly, he maintained that the power of attorney of the 19th July, 1843, signed "Kilian & Stein," by Stein, was null and of no effect, as having been signed by the signature of the firm after the dissolution, by one partner not authorized by the other; and that nothing in section 1, or section 4, authorized one of the partners to sign such power of attorney in favour of Venning & Busk as that in question. Fourthly, he maintained that the ratification of Jerram's act in bringing the action for Oppenheimer, as the general and special agent and attorney of Kilian, was not sufficient to give effect to the power of attorney in favour of Venning & Busk: and that this power, being dated only this day, could not be used as evidence to support the title which defendants, in their answer to the exception, alleged that they then had, when they filed it, which was on the 27th July; and that if this power were, for the sake of argument, to be taken as evidence of the fact alleged in it, that Oppenheimer had given verbal instructions to Jerram to bring this action before its commencement, still that Oppenheimer was not entitled by this power of attorney verbally to give any such instructions which would be binding on Kilian.

In the course of the argument it was admitted by both parties that this action was brought at Kilian's instance and that Stein was opposed to the action.

Ebden argued *contra*.

It was also alleged, and offered to be proved *instanter* by the plaintiffs, and not denied by the defendant, that, in point of fact, Venning, Busk, & Co., after the arrival in this Colony of the power of attorney in their favour, had collected outstanding claims due to Kilian & Stein to the amount of about £7000, and remitted the same, with the knowledge of both Kilian and Stein, in the manner directed by the deed of dissolution.

Cur. adv. vult.

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Postea (August 14, 1845).—The Court overruled the exception to the plaintiffs' title; costs to be subject to future order after the final issue of the cause.

The Court were unanimously of opinion, first, that when A B has granted a power of attorney to C D, authorizing C D to institute legal proceedings on behalf of A B, and when C D, in his capacity as attorney of A B, has granted to an attorney of the Court the warrant or authority to sue, prescribed by the eighth rule of Court, it is competent, according to the practice which has generally prevailed since the institution of the present Court, and without regard to what may have been the practice of the late Court, for the summons to be issued and the other proceedings to be instituted and made to run in the name and as at the instance of A B alone, as plaintiff, without any mention being therein made of C D the attorney.

Secondly.—That after the date of the dissolution of the partnership, neither of the partners could legally grant a valid and effectual power of attorney, in the name and under the signature of the late firm, to any person to collect the outstanding debts due to the firm, unless such partner were specially authorized to do so in the deed of dissolution or by some other deed executed by the other partner.

MENZIES, J., and MUSGRAVE, J., held that the words in the first clause of the deed of dissolution—"and they are permitted to sign in the name of 'Kilian & Stein' only in so far as is required towards its liquidation," did authorize either of the partners under the signature of "Kilian & Stein" to grant the power of attorney in question to Venning & Busk. They held that the permission given by those words was not restricted absolutely to deeds of such a nature that unless they were executed in the name and under the signature of the firm, and not otherwise, the liquidation of the firm could not possibly be effected, because no such deed could be imagined, and because, therefore, to give such a construction to the words in question, would be to deprive them of all effect, and lead to the conclusion that the parties had introduced them without intending they should have any meaning or effect given to them; and that these words must be construed to mean any deed which was requisite, as being expedient to effect the liquidation of the estate according to the principles laid down in the deed of dissolution. They held that the fourth section of that deed so clearly and distinctly prescribed the manner in which the amount of the outstanding claims, when collected, should be disposed of, as to leave the collectors, whosoever they might be, no discretion in the

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matter; and as to deprive each of the partners of the power of directing, without the special consent of the other, any different mode of remittance or disposal. That the said fourth section expressly provided only two sets of persons by whom the outstanding claims were to be collected, viz., that Messrs. Venning & Busk should be empowered to collect them, unless the partners should consider it advisable to entrust the collection to their joint attorneys at the Cape. That if either of the partners did not think fit to adopt the latter alternative, the only persons who could, under the provisions of the deed of dissolution, be authorized to collect them were Venning & Busk; consequently, either partner could have compelled the other to join with him in executing a deed empowering Venning & Busk to collect the outstanding debts; and that, consequently, neither could validly object to the other partner's executing, in the name and under the firm, that power in favour of Venning & Busk which he himself could by law have been compelled by the said partner to join in the execution of, and which power of attorney had, in consequence of the latter declining to entrust the collection of the outstanding claims to their joint attorneys at the Cape (viz., the attorneys appointed by each for the purposes specified in the third section of the deed of dissolution), become a deed, which was absolutely and indispensably requisite for the liquidation of the estate in the manner prescribed in the deed of dissolution. That as no instruments or instrument executed by both parties, either jointly or severally, whereby power or authority was given to the attorney at the Cape of each respectively, jointly with the attorney at the Cape of the other, to collect the outstanding claims due to the firm, had been produced or alleged to exist, the necessary presumption was, that none such had been executed, and that both partners intended that what had taken place should take place, namely, that Venning & Busk should collect the outstanding claims. That the power of attorney in question was not liable to the objection that it had been prematurely executed by Stein, because, in fact, it was not executed, and could not have been made use of before it was absolutely required to carry into effect the deed of dissolution. By the third section of the deed of dissolution it was provided that the partners personally, or their respective attorneys, should leave, or their respective powers of attorney be sent from, Europe within the month of July of the current year, and that so soon as they arrived at the Cape, the power and authority of managing and carrying on the business of the firm, possessed by Messrs. Horn & Birkenruth originally as managers, and ultimately under the instructions con-

veyed to them under the letter of the 27th June, 1843 (written to them under the signature of the firm, as provided in the said third section), should cease to exist; consequently, after that event, Messrs. Horn & Birkenruth could not have collected the outstanding claims, while as the separate attorneys of the partners respectively were, as such, only empowered to receive over the share of the stock to which their principals were entitled, they could, acting in virtue of those separate powers of attorney, neither separately nor jointly collect the outstanding claims. That to entitle them to do this it was necessary that they should have been jointly authorized to do so in terms of the alternative provision at the end of the fourth section, which joint authority it has been shown that they had not been vested with in the month of July, 1843. If, therefore, the power of attorney in favour of Venning & Busk was not intended to have been executed at such a time as to ensure its arrival at the Cape, as soon as by the arrival of the parties their respective attorneys, or their separate powers of attorney, the authority of Horn & Birkenruth to collect the outstanding claims should be put an end to, there would necessarily have been a certain interval of time during which no one at the Cape would have had any authority or power whatever to collect or receive payment of, and grant discharges for, the outstanding claims due to the firm;—a state of things which it is impossible to suppose either of the partners should desire. On the contrary, it was evident that it was their intention that if they did not proceed to the Cape personally, all the powers of attorney necessary for every part of the liquidation of the estate should be transmitted from Europe in July.

WYLDE, C.J., held that the words above quoted from the first section of the deed of dissolution were not intended to apply, and did not apply, to such an instrument or deed as the power of attorney in favour of Venning & Busk; and that even if they had applied to such an instrument, yet that no effect could be given to it *per se*, because it had been executed before the period at which the parties in framing the provisions of the deed of dissolution contemplated or intended that it should be executed. But he held that Stein, by whom it was executed, was in respect of it bound by and could not repudiate or refuse to confirm the acts done under it by those in whose favour he had granted it; and that as the defendant had not denied what the plaintiffs had offered to prove,—namely, the fact that Venning & Busk had, with the knowledge and consent of Kilian, collected, and, in terms of the deed of dissolution, remitted

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outstanding debts to the amount of £7000,—he must be held to have adopted it, and made it his own deed, and therefore was equally bound by the acts done under it by Venning & Busk as Stein was;—consequently, that any discharge or acquittal granted by Venning & Busk for any outstanding debt due to the firm, collected by them, would bind and be effectual against both Kilian & Stein; and, therefore, that as the defendant could not object to the title of Venning & Busk to institute this action, on the ground that if he paid the debt they could not give them a discharge or acquittal which could be effectual to them against Kilian & Stein, he could not maintain the exception to them both which he had pleaded.

The Court held unanimously that the notarial acts executed by Oppenheimer could not be received as evidence that he had given such previous instructions to Mr. Jerram to institute this action as therein alleged. That even if it had been proved that he had given such instructions verbally, such verbal instructions would have been insufficient to authorize Jerram to institute this action, as at the instance of Kilian & Stein, if he had not previously been sufficiently authorized to do so by the power of attorney in favour of Venning & Busk; and lastly, that no authority given by Oppenheimer to Jerram to institute this action, which was not made known to the defendant before he filed his exception, or at least in or before the plaintiffs had filed their answer thereto, could be pleaded as a legal and valid answer to the exception.

After the Court had declared the grounds of the judgment, the parties for the first time produced the separate notarial powers of attorney, which in terms of the third section of the deed of dissolution they have respectively granted, to their attorneys; namely, one by Kilian, dated London, 11th July, 1843, by which, after reciting the dissolution of the firm of Kilian & Stein, the intended division of the stock belonging to it between him and Stein, and his intention to carry on business in this Colony as merchant on his own account, he appointed M. Escheles and H. Oppenheimer, both then about to proceed to this Colony, " his lawful attorneys for him, and in his name to take all such steps as shall be necessary or advisable for effecting a division between him and the said Louis Stein of all the goods, &c., the property of the said co-partnership now being within the said Colony, &c., and for him, &c., to take and accept all such goods, &c., as shall upon such division as aforesaid be allotted to him, or which shall or may, from time to time, be consigned to the said Colony, &c., by him, or on his behalf." The deed then proceeded to give them

the necessary powers to carry on business for him as a merchant here, and made no mention of, and granted no other power or authority whatever to them, with respect to the winding up of the affairs of the firm of Kilian & Stein, or the collection of the outstanding debts due to it. Also another by Kilian, dated London, 25th July, 1843, in which, after reciting the dissolution of the firm of Kilian & Stein, and the intended division of the goods, &c., in this Colony, between the partners, according to the provisions of the articles of dissolution, and his desire to appoint M. Escheles, then on his way to the Cape, to be his attorney, for the purpose of finally winding up, liquidating, and adjusting the affairs of the said co-partnership on his behalf, as far as relates to the said goods, &c., and all other the estate and effects of the said co-partnership in the said Colony, except any debts which may be due and owing thereto,—constituted and appointed the said Escheles to be his attorney for him and in his name, &c., to do all things that may be necessary for finally winding-up, liquidating, and adjusting between him and his said late co-partner, the affairs of the late co-partnership in the said Colony. "Except so far as relates to any debts which may be owing to the said co-partnership, and to the application of the produce of such debts." The deed then revoked the authority given by the above-mentioned power of attorney of the 11th July, 1843, to the said Escheles and Oppenheimer, jointly, so far as relates to the division of the said goods, wares, and merchandise, and to the receipt and disposition of his share thereof, but not further. And also one by Stein, dated Frankfort, 20th July, 1843, in which, in his capacity as partner of the firm of Kilian & Stein, he declared to grant to Mr. A. Horn, in Cape Town, his general and special power of attorney, in order to represent his person in respect of the dissolution, distribution and liquidation of the mercantile establishment of the aforesaid firm of Kilian & Stein, agreed upon between him and his co-partner, Mr. G. Kilian, by deed of dissolution dated 27th June, 1845; and for the said purpose empowered the said Horn to accomplish, jointly with the said partner or his agent and attorney, the matters aforesaid; and, more especially, to make public announcement of the said dissolution, and to effect, in terms of the said deed of dissolution, the distribution of the stock in trade extant at the Cape; to debit the account proper of each of the partners for the goods severally allotted to them; to collect the debts in favour of the firm, or otherwise to make the same over to Messrs. Venning & Busk for the purpose of collection, and to empower them to grant lawful receipts and acquittals for the same, &c., &c., &c. To remit to this place,

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by means of bills of exchange on London, under cover to Messrs. Cahlman Brothers, in London, the money on hand, or hereafter paid in for the purpose of the liquidation, &c., and generally to do all and singular every matter and thing which shall be requisite and advisable toward a complete dissolution of the said concern at the Cape.

CAWOODS *vs.* SIMPSON.

Contract, breach of.—Special damage.

C. & S. agreed that S. would not, under a certain penalty, carry on the trade of a butcher or aid and assist any other person or persons whatsoever to carry on the said trade, within a certain rayon. S., thereafter, donated to his minor son a certain sum to enter into a butchery copartnership with another party within the said rayon. HELD, *a breach of contract; but no special damage being proved, nominal damages awarded.*

Aug. 28. — Cawoods vs. Simpson.

By a notarial deed executed by the plaintiffs and the defendant on the 30th February, 1844, the defendant, for the considerations therein set forth, covenanted, promised, and agreed with the plaintiffs that he, the defendant, should and would not, either directly or indirectly, by himself personally contract with Government for the supply of the troops with meat, or carry on or exercise the trade or business of a butcher, or aid or assist any other person or persons whomsoever to carry on the said trade and business, during the term of five years, to commence and be computed from 20th March next ensuing, within two miles of St. George's Church at Graham's Town, &c., &c., &c., under a penalty of £600, to be sued for and obtained in any competent Court in this Colony, for any infringement or non-fulfilment of any part of the said agreement on the part of him, the defendant.

In April, 1845, the plaintiffs brought this action against the defendant for the recovery of the said penalty; and in their summons averred that he had infringed, and failed to fulfil part of the conditions of the said agreement, in that he had, since the date thereof, directly and indirectly, either by himself or by others, exercised or carried on, or aided and assisted other persons to carry on, the trade or business of a butcher within two miles of St. George's Church at Graham's Town, and within the said term of five years.

The defendant pleaded the general issue.

At the trial (April 17), after hearing the witnesses produced by both parties, and after the defendant had been judicially examined by the Court on oath, the Court found that the plaintiffs have failed to prove that the defendant has, either directly or indirectly, either by himself or others, committed any breach of the covenants in the deed of agreement of the 13th February, 1844, save and except in so far as the facts hereinafter set forth may be deemed in law to be a breach of the covenant whereby the defendant was bound not to aid or assist any other person or persons whomsoever to carry on the trade and business of a butcher in Graham's Town within the limits and period specified in the said agreement. The Court further found, that after the execution of the said deed of agreement, and within the period therein specified, the defendant did, *bonâ fide*, for the purpose of setting up his son Thomas, then a minor under eighteen years of age, in business, make an absolute gift or donation to his said son of property to the amount and value of £500, knowing and intending that his son should and would employ and invest that sum as capital in a partnership between his said son and one Henry Sparks, who were to carry on business in Graham's Town as butchers, and which partnership was entered into and did carry on business in Graham's Town, within two miles of St. George's Church, having for that purpose bought the goodwill and trade of one Collins, previously carrying on business in Graham's Town as a butcher. The Court removed the case to the Supreme Court for the decision of the question whether the above recited facts amount in law to a breach of the agreement, and further found that if they did amount in law to a breach of the agreement, the plaintiffs have failed to prove any special damage thereby occasioned to them."

The firm of Sparks & Simpson had, since the trial at Graham's Town, been dissolved, and had ceased to carry on business.

This day, after hearing *Ebden* for the plaintiffs and the *Attorney-General* for the defendant, the Court held that by reason of the facts found by the Circuit Court to have been committed by him in the manner set forth in the above-mentioned findings, the defendant had committed a breach of the agreement; and gave judgment for the plaintiff,—damages one shilling, and costs.

Set off may take place in respect of debts due between the same parties in their same capacities.

De Villiers *vs.* Commaille.

Compensation. Delegation of Debt.

1846. Feb. 26. — Villiers *vs.* Commaille.

This was an application for review of the judgment of the Resident Magistrate of Cape Town, given in a case in which De Villiers had been plaintiff and Commaille defendant. Villiers, the father, had let a certain house to defendant at a monthly rent of £3 15*s.*, which defendant had occupied for six months, during four months of which the nominal plaintiff, De Villiers's son, had boarded with defendant, at the rate of £2 5*s.* Villiers had also let to defendant a certain garden at £3 15*s.* per month, which defendant had occupied for two months.

Defendant refused to pay the rent for the time during which he had occupied the house, &c., on the ground that De Villiers had failed to make certain repairs which he alleged he was bound to make. Whereupon the plaintiff as and in the capacity of the general agent for his father, brought an action in the Resident Magistrate's Court for £19 10*s.*, as the balance of an account for six months' rent, due respectively in respect of defendant's occupation of said house and garden.

At the trial, plaintiff's agent produced the account, which was intituled "Mr. Commaille, Dr. to A. B. de Villiers," and contained two items at the debit of defendant, viz.:—

"Dr. 6 months' rent of the house . . .	£22	10	0
2 do. do. of the garden . . .	6	0	0
	£28	10	0"

Below which was written,

"Cr. By 4 months' board for Mr. A. B. de Villiers, at £2 5*s.* . . .	9	0	0
Balance due	£19	10	0"

The record set forth that "the defendant denied the debt and plaintiff's power to sue in this case. Plaintiff states that he has no other claim than the present against the defendant on behalf of J. P. de Villiers."

Defendant objects to the credit in the account, being a debt against A. B. de Villiers, and not against the principal, J. P. de Villiers.

The plaintiff called J. W. C. Gie, who stated:—I presented this account as it now is to the defendant for payment of the balance of £19 10*s.* on the 29th January last. He

read it twice, and said "the account is correct; if Mr. de Villiers give me indemnification for the repairs that are still wanted I will pay it." I told him that I was also requested by plaintiff to ask him to point out the necessary repairs which were still required, and that the plaintiff was willing to have them done; to which the defendant replied "it is of no use."

1846. Feb. 28. — Villiers vs. Commaille.

Objection to the credit given in the account sustained by the Court; and as the sum left in dispute exceeded the Court's jurisdiction, the Court dismissed the case, with costs.

The Court affirmed the judgment of the Magistrate with costs, on the ground that the plaintiff was not entitled to state the debt due by himself individually in compensation with the debt claimed by his father from defendant, unless he could prove that defendant had consented to the father as debtor for plaintiff's said debt, by agreeing to the delegation of that debt to the father, which, they held, the only evidence given by plaintiff (namely, the words spoken by defendant to Gie) did not prove that the defendant had done.

Da Costa *vs.* Le Sueur, Civil Commissioner.

Foreigner undomiciled not liable to military service.

Ordinances Nos. 19 *and* 20, 1846.

June 13. — Da Costa vs. Le Sueur, Civil Commissioner.

Ebden moved that J. J. le Sueur, as Acting Civil Commissioner appointed by the Government of the Colony to enforce the provisions of the Ordinance No. 20, 1846, intitutled "An Ordinance for regulating the levy of the Burgher Force of Cape Town and Green Point," may be interdicted and restrained from taking any further proceedings for the purpose of compelling the said Da Costa to serve as a soldier in the Kafir war. And put in the following affidavit in support of his application:—

"Antonio da Costa, at present residing in Cape Town, seaman, maketh oath and saith, that he is a subject of Her Majesty the Queen of Portugal, was born at Oporto, and forty-six years of age. That he was brought a prisoner to this Colony about two years ago in the whale brig called the *Saint Silva*, a prize to one of Her Britannic Majesty's cruizers, on a charge of being engaged in the slave trade. That this said vessel was subsequently condemned in her said Majesty's Court of Vice-Admiralty of the Colony on the said charge; and that he, the deponent, for the want of

1846. June 13.

Da Costa vs. Le Sueur, Civil Commissioner.

funds to pay his passage to his own country, has ever since remained in Cape Town. And this deponent further saith that he was lately informed by the wardmaster of the division where he has taken up his abode that he has been balloted for to serve as a soldier in the Kafir war, and that he was to see Mr. le Sueur (who, he has been informed, is the Acting Civil Commissioner appointed by the Government of this Colony to enforce the provisions of a certain Ordinance relative to the said ballot) on the subject. And this deponent further saith he made known his situation to Alfred Duprat, Esquire, the Commissioner in this Colony for her said Majesty the Queen of Portugal, and claimed his protection from being forced to take up arms against any enemy but those of his own country; and that thereafter, the said Alfred Duprat accompanied this deponent to the office of the said Le Sueur, and then and there, personally speaking with him, the said Alfred Duprat claimed this deponent's exemption from military service against the Kafirs, but without effect. And this deponent further saith that on the eleventh instant, a policeman called at the dwelling of the deponent to take him into custody, for the purpose, as he has been informed and believes, of drafting him off by sea a distance of six hundred miles, to wage war against the enemies of Her Britannic Majesty, to whom he hath not taken, or been required to take, the oath of allegiance.

"And lastly, that he is not a burgher of this Colony, nor is he entitled to the privilege of a burgher under and by virtue of the proclamation of Lord Charles Henry Somerset, formerly Governor of this Colony, bearing date the second day of May, 1817, or otherwise.

"Sworn this twelfth day of June, 1846, after the same had been interpreted to him by Alfred Duprat, Commissioner to Her Majesty the Queen of Portugal.

his
ANTONIO × DA COSTA.
mark.

"Before me, &c., &c. T. H. BOWLES."

And contended that these facts amounted to a just cause for refusing to serve under the 5th section of Ordinance No. 20, 1846. And quoted *Vattel*, 2, 8, § 105, 106; *Vattel* 1, 9, § 213, *p.* 211, *et. seq.*; *Ferreira sur le Droit des Gens* (*vide* also *Merula*, 4, 2, 24); and maintained that the Ordinances Nos. 19 and 20, 1846, made no alteration in the law as to burgher duty, but only provided penalties not previously existing for a refusal to perform that which by the

previous law were duties which burghers were under an obligation to perform. (Quoted the proclamation of the 2nd May, 1817.) And that before those Ordinances were passed no alien was bound by law to perform burgher duty. And stated that Da Costa had been brought to this Colony against his will, and left here against his will; and therefore could not be considered as being domiciled. He contended that the Kafirs were not in the situation of robbers or pirates, but of public enemies, recognized by this Government as independent states or tribes, by reason of the treaties into which it had repeatedly entered with them.

The *Attorney-General, contra,* maintained that aliens residing in this Colony under such circumstances as to have therein acquired a domicile are inhabitants of the Colony, in the sense in which that term is used in Ordinances Nos. 19 and 20, and maintained that it was not enough to prove a legal claim for exemption from those Ordinances that the person claiming it was alien born and had not obtained a deed of burghership. But admitted that the not being domiciled in the Colony gave such aliens a legal ground of exemption. That although municipal legislation expressly legislating against the law of nations must be obeyed by the tribunals of the country so legislating, yet, that in construing municipal legislation the Court ought, where no such intention was expressed, to construe municipal legislation in accordance with the recognized law of nations. He quoted *Vattel* 2, 8, § 99, and maintained that §§ 105 and 106 only applied to foreigners residing in a foreign country for a temporary purpose, and not to foreigners of the class mentioned in *Vattel* 1, 19, § 212, 213; and that these last-mentioned foreigners are bound to defend the country in which they have been permitted to stay and settle, and thus have become domiciled. That taking out a deed of burghership was not the only, although it might be conclusive, evidence of an intention to become domiciled in this Colony. (*Vattel* 1, 19, 218.) He quoted *Voet* 5, 1, 94, to show what domicile was in the sense in which that word is used by *Vattel*; *Story's Conflict of Laws, cap.* 3, § 43, *page* 41; *Rob. Adm. Rep.*, 2 *vol., p.* 322; *Grotius de Jure Bell.*, 3, 4, § 8, and the note thereon by *Barbeyrac*; *Grotius ibid.*, 3, *c.* 3, § 7; to show what foreigners were liable to pay State taxes, and that such as were liable to such taxes were liable to military service. He quoted *Story's Conflict of Laws, cap.* 14, § 541, and maintained that a Portuguese, if domiciled in Cape Town, might, according to the law of nations, be legally compelled to defend Cape Town against a French squadron, although desirious of entrusting the safety of his person and property to the respect which he

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believed would be shown by the French to his Portuguese nationality; that the attack being made on a district remote from that in which the Portuguese was domiciled made no difference; and referred to the proclamation 10th August, 1817. He did not deny that Da Costa was a Portuguese subject, and had come to the Colony in the manner set forth in the affidavit; and admitted that if the Court, under these circumstances, held that Da Costa was here only for a temporary purpose, and *sine animo remanendi*, then that he was not liable to be called on to serve under the provisions of the 20th Ordinance, 1846.

The Court held that, under the circumstances set forth in the affidavit of the applicant, and admitted by the respondent, Da Costa must be deemed to be here only for a temporary purpose, and *sine animo remanendi*, and therefore had not acquired such a domicile in the Colony as rendered him liable to be called on to serve under the provisions of the Ordinance No. 20, 1846. But gave no decision on any of the other questions which had been argued by the *Attorney-General*. And therefore the majority of the Court (WYLDE, C.J., and MENZIES, J.) granted the interdict, as prayed, with costs.

MUSGRAVE, J., retained the same opinion expressed by him in the case of Dreyer, *supra* 22nd May, 1846, that the presumption that the Magistrate would, when the matter was judicially brought before him, act according to law, was so strong that it was not removed even by the facts sworn to by Da Costa in his affidavit. Consequently, that there were no grounds for granting the interdict.

HART & CANSTATT *vs.* NORDEN.

Verbal injury. Probable cause.

June 15. — Hart & Canstatt vs. Norden.

This was an action of slander, brought by the plaintiffs, to recover damages from the defendant on account of certain statements, highly injurious to their character, as charging them with having been guilty of a fraudulent conspiracy, alleged to have been falsely and maliciously made by the defendant.

The defendant pleaded, first, the general issue; secondly, a plea of justification as to all the statements alleged in the declaration except one.

At the trial, the plaintiffs proved that all the statements injurious to their character alleged in the declaration had been made by the defendant.

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The defendant led evidence at great length in support of his plea of justifiaction.

The Court found that the defendant had failed to prove the alleged conspiracy, as stated in his plea of justification, wherefore the plaintiffs are entitled to the judgment of the Court; but in respect of the defendant's plea of general denial, found that such probable cause, and, connected therewith, such impropriety of conduct on the part of the plaintiffs had been proved by the defendant as to reduce the damages thereon to a nominal amount, and therefore gave judgment for plaintiffs; damages, twenty shillings; and, under all the circumstances, adjudged that each party should pay their own costs.

Stoll *vs.* Crous.

Default. Watching-brief. Counsel. Where defendant has made default, no watching-brief permissible.

Aug. 13.

Stoll vs. Crous.

In this case, in which defendant had made default, *Ebden* stated that he held a watching-brief for defendant.

But the Court, on the authority of the decision in the case of *Luck* vs. *Owen*, 5th November, 1835, would not permit him to interfere in the case; and to prevent misapprehension in future on the part of parties in default, promulgated a rule in terms of the above decision. (*Vide* Rule 214.)

Chiappini & Co. *vs.* Field, Collector of Customs.

Statute 8 *&* 9 *Vict., cap.* 93, *s.* 79.

Notice necessary to Collector of Customs in actions against him under above statute.

1847. Feb. 4.

Chiappini & Co. vs. Field, Collector of Customs.

This was an appeal from the sentence given by the Resident Magistrate of Cape Town in an action brought by appellants as plaintiffs against the respondent as defendant, in which they complained "that the Hon. Wm. Field, Esq., of Cape Town, Her Majesty's Collector of Customs at the Cape of Good Hope, is indebted to them in the sum of £4 6*s.* 7*d.*, in his aforesaid capacity, for the amount of duties and wharfage erroneously and illegally charged and received by the said Field in his said capacity from the said Chiappini & Co., on or about the 28th April and 3rd

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November, 1845, which sum the said Field refuses to pay, and the said Chiappini & Co. pray he may be adjudged to pay the same."

The defendant had appeared personally, and referred to the statute of the 8th and 9th Victoria, cap. 93, § 79, and objected that he had not received the notice therein prescribed. The Resident Magistrate dismissed the action, with 10*s.* 10½*d.* costs.

This day, *Ebden*, for the appellants, maintained that in consequence of the nature of the act done by the defendant and complained of by plaintiffs, it could not be held to have been done in the exercise of the defendant's office, and consequently that the provisions of the section of the statute did not apply.

The Court held that the statute applied, dismissed the appeal, and affirmed the sentence of the Resident Magistrate. The respondent did not ask for costs.

NORDEN, EXECUTOR OF HORN, *vs.* KILIAN & STEIN.

Putting to silence.

Feb. 11.

Norden, Executor of Horn, vs. Kilian & Stein.

In this case, the partners of the firm of Venning, Busk, & Co., in their capacities of attorneys and agents, in this behalf, of G. Kilian and L. Stein, heretofore trading in this Colony under the firm of Kilian & Stein, and also M. Elken, the attorney and agent here of the said G. Kilian, and M. Eskeles, the attorney and agent here of the said L. Stein, heretofore co-partners as aforesaid of the said firm, now dissolved,—were summoned by the plaintiff in his capacity of executor of Horn, "that justly and without delay, they, the said Venning, Busk, & Co., or the said M. Elken and M. Eskeles, acting on behalf of the said late partners of Kilian & Stein, do institute an action against the plaintiff, as testamentary executor of Horn, in respect of certain claims which the said late firm of Kilian & Stein, heretofore alleged in the Supreme Court to have against the plaintiff in his said capacity, or against the estate of the said Horn, viz.,—first, a claim of £1,696 16*s.*; second, a claim of £949 7*s.* 7½*d.*; third, a claim of £210 17*s.* 1¼*d.*; but which action was subsequently withdrawn on the part of the said Kilian & Stein before the same came to trial; and unless they should do so, to show cause wherefore they shall not be compelled to institute the said action within six weeks from the date hereof; and in case they shall not institute such action within such period, to show cause why they,

in their several capacities aforesaid, shall not respectively be barred from making their said claim and all other claims whatever against the plaintiff in his said capacity, or against the estate of the said Horn, and have perpetual silence imposed upon them in respect thereof.

No appearance was made for Venning, Busk, & Co., as the attorneys and agents of the late firm of Kilian & Stein; nor for M. Elken, as attorney and agent of Kilian, co-partner of said firm. But *Ebden* appeared for M. Eskeles, as attorney and agent for the said L. Stein, and referring to the case of *Burgh* vs. *Smuts*, 11th August, 1835, maintained that this action should be dismissed, as against him, with costs, on the ground that it was brought without any necessary cause in respect of the proceedings in the action referred to in the summons for the three alleged claims against the estate of Horn therein specified, whereby Stein must be held to have judicially abandoned all right of action for those claims in this court. And secondly, in respect of a certain submission to arbitration entered into between the said M. Eskeles and J. N. Hess, the managers in this Colony of the business of the said L. Stein, as acting for and representing the said L. Stein and the plaintiff in his capacity of executor testamentary of the said Horn, sometime manager in the Colony of the business of the said L. Stein,—in which, after reciting that differences had arisen between the parties as to certain items in the thereunto annexed accounts-current between the said Horn and his estate in account with the said L. Stein,—three of which items included the sums for which the above-mentioned action at the instance of Kilian & Stein had been brought against the plaintiff, and to which last-mentioned three items the said Norden in his aforesaid capacity had objected, as well on other grounds as on that of their being claimed at the instance of the said L. Stein,—they agreed to submit and refer the aforesaid matter in dispute, and the final adjustment of the said accounts, as affected by the said objection, to the final determination, &c., &c. And in which submission the arbitrators had made an award, in which, after deciding as to the other items in dispute between the parties, they awarded and adjudged that the said three items (which included the sums claimed in the action aforesaid, and to the claim for which by Stein on his individual account Norden had objected) be expunged from the said account, and that the effect of the said award is to leave the three items last mentioned open for future arrangement and decision between the parties representing the late firm of Kilian & Stein and the executors or representatives of the said Horn;—and also determined the balance on the remaining items in the said accounts at the

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sum of £605 16s. 9d., as due by the said Louis Stein to the estate of the said Horn. The effect of which award, he maintained, was a final decision as to those items as against Stein, and therefore prayed that the present action for putting Stein to silence was unnecessary and improper.

In the action above mentioned at the instance of Kilian & Stein against the estate of Horn, the plaintiffs had declared,—the defendant had excepted to the declaration,—and the Court had allowed the exception with costs, with leave to amend, or file a new declaration. On the 28th February, 1846, the defendant had prayed for leave to sign judgment against the plaintiffs, with costs, by reason of their default. Whereupon, upon hearing what was alleged by *Ebden* for the plaintiffs, by consent it was ordered that the case be withdrawn; the defendant to pay all costs of suit, except the costs of this motion.

The Court held that this action for putting to silence was brought solely against Kilian & Stein as partners, and thus representing the late firm of Kilian & Stein, and not in their individual capacities. That, as the submission was between the plaintiff and Stein in his individual capacity, the award was not binding against Kilian & Stein, even if it had not expressly left open the claim for those items to be decided between the representatives of the firm and the plaintiff. That the withdrawal of the above-mentioned action did not bar the representatives of the firm of Kilian & Stein from instituting a fresh action for the same sums sued for in the former; and that the plaintiffs in that action obtaining leave to withdraw it instead of allowing judgment to be signed against them by default, afforded to the present plaintiff grounds for presuming that the representatives of Kilian & Stein did mean to institute a fresh action; and that this circumstance and the duty of the present plaintiff to wind up the estate of Horn without delay warranted him in bringing this action; and that the representative of Stein —if he meant to abandon his claim as a partner of the late firm of Kilian & Stein for the sums in question—ought either to have written to the plaintiff's attorney to that effect, or allowed decree to go against him, without appearing,—in either of which cases he would not have been liable in costs. The Court, therefore, granted decree against all the defendants,—putting them to silence, as prayed; with costs against Eskeles, as attorney of Stein.

HAUPT, APPELLANT, *vs.* CLERK OF THE PEACE, STELLENBOSCH, RESPONDENT.

In how far the Board of Landdrost and Heemraden possessed the power of making regulations regarding the distribution of water, and of fixing penalties on contravention of them. Power of the Governor to legislate after the establishment of the Council of Government of 1825.

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In the year 1806, Eksten, the proprietor of the places Rustenberg and Schoongezicht, situated in the district of Stellenbosch, entered into an agreement with, and obligation to, certain proprietors of other places which were situated lower down on the stream formed by sundry rivulets running through Rustenberg and Schoongezicht, by which he undertook to allow to the proprietors of the said last-mentioned places the use of the water flowing from the said rivulets in a certain way and at certain times, and obliged and bound himself, as proprietor of the said two first-mentioned places to pay a certain penalty as often as the conditions of the said agreement and obligation should be violated by the proprietor of Rustenberg and Schoongezicht. This agreement was ratified and confirmed by the Board of Landdrost and Heemraden at Stellenbosch. In 1818, after Rustenberg had become the property of Van der Byl, and Schoongezicht the property of H. Cloete, Briers, the proprietor of one of the said lower places, complained to the Board of Landdrost and Heemraden of Stellenbosch, that Van der Byl and Cloete had violated the conditions of the said agreement, and claimed from each of them the penalties therein stipulated. The Court of Landdrost and Heemraden condemned these parties to pay only one penalty *in solidum*, reserving to the party paying his relief *pro rata* against his co-proprietor.

Both the plaintiff and defendants appealed from this sentence to the then Court of Justice, which, on the 14th June, 1819, affirmed it, with this additional finding, viz., "While further, in consequence of the existing doubtfulness with regard to the above-mentioned agreement (viz., that of 1806), the Landdrost and Heemraden are recommended as the magistrates of police of the district in which the respective places of the parties are situated, to regulate, in future, the further use of the water in such manner, under the approbation of His Excellency the Governor, as thereby to prevent, as far as possible, all opportunity of going to law; and until such further regulation be established, the existing agreement is to continue in observance."

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Briers and Van der Byl acquiesced in this sentence, but Cloete appealed against it to the Court of Appeals, by which, on the 17th February, 1821, it was confirmed. The Board of Landdrost and Heemraden appointed two of their number to inspect the water-courses of Schoongezicht, Rustenberg, and the lower places, Groot and Klein Idas Valley, Nazaret, Helderfontein, and Kromme River. This committee made a report in which, *inter alia*, they stated that all the above places, which are entitled to the run of the water in question, may have it in abundance, provided only the regulation of 1806 be complied with. Thereafter the Board of Landdrost and Heemraden drew up a code of regulations, consisting of twenty articles, regulating the use of the water in question among the places above mentioned. Whereof the 18th and 19th articles were as follows:—

"Article 18.—Any person transgressing, either wholly or partly, these regulations, shall for each offence forfeit a penalty of 500 rixdollars, on behalf of the treasury of the district.

"Article 19.—This penalty shall be levied in the following manner. Any of the parties concerned conceiving himself injured in his legal right to the water shall lay his complaint before the Landdrost of this district, who will then order the field-cornet to proceed with two impartial witnesses to the place in dispute, and should it appear from his report that any one of the points contained in these regulations has been transgressed by the accused party, he shall in such case be summoned and resummoned on the said report of the field-cornet only, without any further proceeding, by the secretary of the district, for the said penalty and expenses of the field-cornets and witnesses, and execution thereupon proceeded to in the usual manner."

These regulations having been transmitted by the Board of Landdrost and Heemraden to the late Court of Justice, this Court, by a letter dated 18th September, 1822, signed by its secretary, and addressed to the Governor, acknowledged that the same had been sent to them for their approbation, and stated as follows:—

"Which we have very attentively examined, and whereon, as far as relates to the regulations, we have not found anything that, according to our opinion, could withhold from us our approbation. But with regard to the 18th and 19th articles, the first fixing a penalty upon the transgression of the regulations, and the latter containing the manner to proceed for the recovery of the same, we cannot avoid recommending to your Excellency our remarks that we consider the penalty to be too high, and capable of a reduction

of half the sum mentioned; and we find no reason to deviate in these respects from the ordinary manner of proceeding. Submitting these our remarks to your Excellency's enlightened judgment, we have the honour to present your Excellency what have been laid before us, seeing that they cannot bind the parties concerned as long as they are not confirmed by a legislative sanction, and for that purpose we present to your Excellency the original regulations with a translation of them.

"We have the honour to be, &c., &c.,

"D. F. BERRANGE, Secretary."

In 1825 a Council was, by His Majesty's Letters Patent, established to advise and assist in the administration of the Government of this Colony.

On the 21st February, 1826, the following letter was written by the Secretary to Government to the Court of Justice:—

"Colonial Office, 21st February, 1826.

"GENTLEMEN,—The Board of Landdrost and Heemraden having by their letter on the 6th inst. transmitted for His Excellency the Governor's sanction a copy of the regulations framed by them for the irrigation of the place Schoongezicht, &c., &c., situated in the district of Stellenbosch, with extracts of the resolution of your worshipful court, dated 29th August and 12th January last, as well as a copy of a letter written by you to His Excellency on the 18th September, 1822, on the same subject, I am directed by His Excellency to acquaint you that he has been pleased to approve of the regulations in question, subject to the amelioration of the 18th and 19th articles as suggested by your letter of the 18th September, 1822 above alluded to, and which having been fiated by His Excellency you will receive herewith.

"R. PLASKETT,

"Secretary to Government."

A copy of these regulations, having the penalty in the 18th article reduced to 250 Rds., the original 19th article, above quoted, wholly omitted, and the article originally numbered 20, therein numbered 19, were transmitted to the Board of Landdrost and Heemraden of Stellenbosch, with a letter of the same nature as that to the Court of Justice above quoted; and copies of the regulations

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and the Governor's approval were transmitted by the Board to the proprietors of all the places to which the regulations applied.

On the 14th January, 1847, the Clerk of the Peace, as Public Prosecutor, prosecuted in the Court of the Resident Magistrate of Stellenbosch, according to the usual form of proceeding in criminal cases, P. A. Haupt, the appellant, proprietor of the place Rustenberg, for a contravention of the 6th article of the said regulations, alleged in the complaint to have been duly made and passed by the Board of Landdrost on the 3rd day of June, 1822, and approved by His Excellency the Governor on the 21st day of February, 1826, by having on the 4th of January, 1847, hindered the water from running to the place Kromme River, the property of G. J. du Toit. The cause was tried, and the evidence led in the usual form, on the 19th January, when the defendant was found guilty, and sentenced to pay a sum of Rds. 125, with costs.

This judgment was brought under review by the appellant, who sought to have the same set aside and reversed on the following grounds,—first, that the Magistrate had no jurisdiction to try or decide the case in question, the alleged right of the said Du Toit to the water in question being disputed by the appellant; second, that the regulations of the late Board of Landdrost and Heemraden, upon which the said judgment proceeded, were not in force within this Colony, or binding upon the appellant, inasmuch as the said Board had no power to make any such regulations as aforesaid, fixing penalties as in the said regulations are contained, much less had the said Board or the Governor of the Colony the power, after the establishment of the Council in this Colony in 1825, to make any laws fixing penalties against parties contravening such regulations; third, that the said regulations are not binding upon the appellant, inasmuch as the same were not published in the manner as heretofore by law provided; fourth, that the said regulations are not binding upon the appellant, inasmuch as he received transfer of his farm Rustenberg without any reference whatever to the said regulations, and that the transfer of the right of property with its appurtenances is unconditional, and not subject to any restriction whatever; fifth, that the said regulations, if at all binding upon the appellant, can only be enforced by the parties themselves or by the Clerk of the Peace in a civil suit, and not by a criminal prosecution.

This day, *Brand* and *Ebden*, for the appellant, argued in support of the second ground of appeal, and maintained, first, that the judgment of the 14th June, 1819, confirmed

by the Court of Appeal on the 17th February, 1824, did not convey power to the Landdrost and Heemraden to make regulations of the nature of those which they had made, particularly the 18th, which provided a penalty for any contravention of the regulations, if they had not previously such power by the constitution of their offices; secondly, that the Landdrost and Heemraden had by the constitution of their offices no power by their own authority to make such regulations as those in question, and referred to Arts. 3, 19, 99, and 103, 126, and 166 of the instructions for the country districts; thirdly, that as these instructions did not give the Landdrost and Heemraden power to make regulations respecting water rights or providing penalties with the approbation of the Governor,—and although before the establishment of the Council in 1825, the Governor being himself the Legislature, his approbation declared or sanction given to regulations framed and proposed by the Landdrost and Heemraden might have had the effect of making such regulations law,—yet that after the establishment of the Council no sanction given by the Governor alone without the intervention of the Council could have the effect of making them law.

The *Attorney-General*, for the respondent, argued *contra*. He admitted that the recommendation of the Court of Justice, confirmed by the Court of Appeal, to the Board of Landdrost and Heemraden to make further regulations, could not, by reason of any authority thereby derived from those Courts to the said Board, have the effect of making such regulations law, if the Board had not previously in themselves a legal power to make such regulations. He produced and referred to the two letters above quoted, of the 18th September, 1822, and 21st February, 1826. He maintained that by the law of the Colony, previous to the establishment of the Council, regulations respecting the use of streams could legally and effectually be made by the Landdrost and Heemraden with the sanction of the Governor given, not in his legislative capacity, but as head of the Executive Government; and that such was the law of the Colony was proved by the above quoted judgments of the Court of Justice and Court of Appeals. Second, he referred to the Royal Instructions by which the Council of Government was established in 1825, and maintained that it was a mere Council of advice, and that notwithstanding its establishment, the legislative power of the Governor remained in him entire and unrestricted.

The further hearing of the case was postponed, to give the respondent an opportunity of producing the original of the regulations having the fiat of the Governor thereon.

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Postea (February 25, 1847).—The *Attorney-General* produced the original of the regulations having the fiat of the Governor written thereon, and signed by him. In this document, the 18th and 19th articles of the regulations as originally proposed by the Board of Landdrost and Heemraden remain unaltered, the penalty in the 18th being Rds. 500, and the 19th containing the form of proceeding for the recovery of the penalty, as proposed by the Board. Under these circumstances, the *Attorney-General* stated that as, if the regulations were law, the copy which bore the Governor's fiat must be held to establish the terms of that law, and as the conviction had been obtained by a different form of proceeding than that directed by Article 19, and the sentence had been given for a different penalty than that provided by Article 18, he would not attempt to press the case further, and consented that the sentence of the Resident Magistrate should be reversed.

Sentence reversed accordingly.

[*Vide De Wet vs. Cloete, 3rd December*, 1829, where in a civil suit the above-mentioned regulations were admitted by the parties to be in force, and were given effect to by the judgment of the Court.]

ATTORNEY-GENERAL, Q.Q., COLONIAL GOVERNMENT, *vs.* HART.

In an action for the purchase price of ground in a village sold by the Government under this condition, that a plentiful supply of water will be furnished to each erf at the expense of the district, under the usual regulations, in a reconventional claim the defendant proved that such a supply of water had never been enjoyed by him, although he had been in possession for twenty-two years, and that his annual loss from the want of water had been considerable. The Court gave judgment in convention in favour of the Government, and in reconvention against the Government, for damage suffered by defendant.

June 22.

Attorney-Gen., q.q. Colonial Government, *vs.* Hart.

This action was brought by the *Attorney-General*, suing for and on behalf of Her Majesty the Queen.

The declaration set forth that on the 14th April, 1825, the then Landdrost of Somerset, acting as such for and on behalf of his then Majesty the King, sold to the defendant, and the defendant purchased from the said Landdrost, two erven belonging to his said Majesty in right of his Crown

situated in the village of Somerset, for the price of £67 2*s.* 6*d.*, to be paid by the defendant to his said Majesty and his successors at the end of five years from the day of the sale, with interest thereon from the day of the sale, which period of five years has long since elapsed. That although the defendant thereupon entered into possession of the said erven, and hath ever since continued in such possession, without let or hindrance, yet he hath not paid, and still refuses to pay, the said sum, or any part thereof; wherefore the plaintiff prays that the defendant may be condemned to pay to the Treasury of the Colony, for and on behalf of our Lady the Queen, the said sum of £67 2*s.* 6*d.*, together with the interest thereon *a tempore moræ*, being the date of the sale.

The defendant pleaded, first, the general issue; secondly, that one of the conditions stipulated and agreed at the sale to be performed and fulfilled on the part of the plaintiff, or of the Government of this Colony, namely, to furnish a plentiful supply of water to each erf at the expense of the district, under the usual regulations, has never been fulfilled. That this condition or covenant is in the nature of a condition precedent, and that the defendant is not liable to pay the amount of the price until the plaintiff, or some other person on behalf of the Government of the Colony, shall have supplied the said water to the said two erven. And also made a claim in reconvention, which set forth that the said plaintiff in convention and defendant in reconvention, is indebted to him, the said plaintiff in reconvention, in the sum of £228, for damages accruing to the said plaintiff in reconvention, having refused and neglected, although often requested so to do, to perform and fulfil a certain agreement entered into between the said Llanddrost of Somerset and the plaintiff in reconvention at the sale of the said erven, to furnish the said erven with a plentiful supply of water; wherefore the said plaintiff in reconvention prays that the said defendant in reconvention may be condemned to pay the said sum of £228 with costs.

In his replication, the plaintiff joined issued with the defendant on the two pleas pleaded by him in convention, also on his claim in reconvention.

At the trial it was admitted by both parties that the two erven in question were purchased by the defendant on the 14th of April, 1825, for the price alleged in the declaration, under certain conditions of sale, contained in a memorandum, which was put in and admitted, one of the conditions contained in which was:—"A plentiful supply of water will be furnished to each erf, at the expense of the district, under the usual regulations."

1847. June 22. — Attorney-Gen., q.q. Colonial Government, vs. Hart.

A number of witnesses were called, whose evidence proved to the satisfaction of the Court that the erven in question had never had a plentiful supply of water furnished to them from the time of the sale to the establishment, by law, of the Municipality of Somerset, in March, 1837, to the Commissioners of which the whole of the water at the disposal of Government was then conveyed for the use of the Municipality. That for the first two years after the sale these erven had had a certain supply of water, which flowed over the water-wheel of a mill which belonged to Government, and was let by it. That the inhabitants in general having complained of the obstruction to their water caused by the mill, the Government sold its site, and turned off all the water in another direction, which deprived the two erven in question altogether of the water, and from that date to the establishment of the Municipality, these erven had no water at all supplied to them by Government. That if the possessor of these two erven had had a plentiful supply of water for them, he would have been able, after paying the interest on the price, to make from them an annual profit of about £7 10*s.* more than he could do without water.

The *Attorney-General* maintained that the non-performance of the condition to furnish a plentiful supply of water could not be pleaded in bar of the claim for the price of the land sold and delivered, made in the *actio venditi*, because the obligation to supply water was altogether extrinsic to the contract of sale of the land, and therefore the non-fulfilment of the obligation, if proved, could only give the defendant a claim for the damages sustained by him by its non-performance. Second, he maintained that the evidence did not prove the non-performance of the condition, or at least that the defendant had suffered any damage by the non-performance. And, as to the mode of estimating such damage, quoted *Bell's Commentary* on the *Bankrupt Law of Scotland, vol.* 1, *p.* 449.

Brand, contra, stated that he withdrew his second plea, and now founded only on his claim for damages in his action in reconvention. And quoted the cases decided by this Court of *Prince vs. Horak's Trustees, 27th February,* 1833, *Fichat's Ex. vs. Government, 27th August,* 1833.

The Court gave judgment for the plaintiff in convention for £156 12*s.*, being the amount of the price of the erven, with interest thereon from the date of the sale to the date when the summons in this action was issued, holding that in the particular circumstances of this case the general rule, that a creditor cannot recover arrears of interest to a greater amount than that of the capital itself, ought not to be

applied, as it would be unjust to allow the defendant anything on account of the profits he might have made in certain years without charging him for the interest applicable to those years. And gave judgment for the plaintiff in reconvention for £157 10*s.*, being the estimated amount of damage he had suffered by not having a supply of water between the date of the sale and the establishment of the Municipality. The defendant in convention to pay plaintiff's costs down to the 19th November, 1846, inclusive, said plaintiff to pay said defendant all subsequent costs.

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MUNICIPALITY OF CAPE TOWN *vs.* MORKEL AND DE VILLIERS.

Jurisdiction of Resident Magistrate. Ordinance No. 20 *of* 1847.

Non-jurisdiction of Resident Magistrates to decide as to the validity of an Ordinance duly promulgated as having been passed by the Governor with the advice and consent of the Legislative Council.

In this case, the Commissioners of the Municipality, by their secretary, in virtue of the provisions of Ordinance No. 1, 1840, had prosecuted the defendants in the Court of the Resident Magistrate for Cape Town, on the charge of having been guilty of contravening the 133rd and 137th sections of the Regulations of the Cape Town Market, duly made and published in the *Government Gazette* of the 11th June, 1841, by having driven certain sheep from the country into Cape Town without having passed them to the said market, &c., &c., contrary to the provisions of the said regulations, and prayed that the defendants might be condemned to pay the penalties prescribed by the said regulations for such contraventions.

1848. Feb. 29. — Municipality of Cape Town *vs.* Morkel & De Villiers.

The defendants pleaded not guilty. They admitted that the number of sheep mentioned in the plaint passed the market as set forth. Denied contravention of the regulations mentioned in the plaint, inasmuch as they have been repealed by Ordinance No. 20 of 1847, and referred particularly to the second section of that Ordinance, and the preamble of the same.

After recording this plea, the record of the proceedings in this case, without stating that any replication or answer was made to this plea, merely set forth that the prosecutors called

Mr. Le Sueur, acting for the Honourable Secretary to Government, to produce Sir Henry Pottinger's commission

1848. Feb. 29.

Municipality of Cape Town vs. Morkel & De Villiers.

as Governor, and the Letters Patent and Royal Instructions under which the Legislative Council is constituted, and four despatches from the Secretary of State for the Colonies to the Governors of the Colony (the subject and dates of which it is unnecessary in this report to specify).

"Severally rejected by the Court."

Also Mr. Hope, Clerk of the Councils, to produce,

1st. A certain petition of the Municipality of Cape Town to the Legislative Council.

2nd. A protest by the Hon. H. Ross, member of the Legislative Council, against the passing of the Ordinance No. 20, 1847.

3rd. Letters Patent and Royal Instructions under which the Legislative Council is constituted.

4th. Minutes of the Legislative Council upon the second reading of Ordinance No. 20, 1847.

"Severally rejected by the Court."

The Hon. John Bardwell Ebden, to prove that upon the second reading of Ordinance No. 20, 1847, a motion was made by him in the Legislative Council, that the Municipality be heard by counsel, and that it was rejected.

"Rejected by the Court."

Mr. Hope, Clerk of the Councils, recalled to prove that the Ordinance No. 20, 1847, has not yet obtained Her Majesty's approval.

"Rejected by the Court."

Case closed.

Judgment: Case dismissed.

This judgment was this day brought under the review of the Court, and the defendants were summoned to show cause why the said proceedings should not be set aside, and the said judgment reversed, on the grounds—

1st. That the Resident Magistrate rejected certain evidence which was then and there tendered, and

2ndly. That the said Magistrate illegally dismissed the case without sufficiently hearing the parties.

From the statements made to the Court by *Ebden* for the prosecutors, and the *Attorney-General* for the defendants, it appeared, that in replication to the plea of the defendants, the prosecutors had pleaded and maintained that the 133rd and 137th Municipal Regulations had not been repealed, because the said Ordinance No. 20, 1847, which professed to repeal them, was null and void, by reason that it was beyond the powers with which the Legislative Council are vested by their constitution to pass such an Ordinance.

And that the Resident Magistrate had thereupon stated that he had no jurisdiction to try the question whether an Ordinance duly promulgated as having been passed by the

Governor and the Legislative Council was invalid by reason that in passing it the Governor and Council had exceeded their powers. It was also admitted that all the documents which the witnesses called by the prosecutors were required to produce, were sought by the prosecutors to be put in evidence solely for the purpose of endeavouring to prove that the Legislative Council had exceeded their powers in passing the Ordinance No. 20, 1847.

MENZIES and MUSGRAVE, J.J., held that in consequence of what was pleaded in replication by the prosecutors, the only question at issue between the parties was, whether the Ordinance No. 20, 1847, was valid or null and void, and that no inferior Court in the Colony was competent to try and decide a question as to the alleged invalidity of any Ordinance which had been duly promulgated as having been duly passed by the Governor and the Legislative Council; and that supposing the case, that, by infringing the Royal Instructions which embodied the constitution and powers of the Legislative Council, the Governor and Council should pass and promulgate as valid an Ordinance which it was beyond their powers to pass, and that it was competent for any Court in the Colony to try and decide whether such an Ordinance so promulgated was valid and must have legal effect given to it, or was null and void and of no effect in law, the Supreme Court was the only Court which could possess jurisdiction to try and decide such a question.

That as the documents tendered in evidence by the prosecutors were not relevant to any question at issue between the parties which the Resident Magistrate had jurisdiction to decide, he did right in rejecting such evidence, and as the only question at issue between the parties was one beyond his jurisdiction, he did right in dismissing the case.

WYLDE, C.J., in his judgment, remarked that he considered the record of the proceedings below to be defective rather in not stating more fully the course of the proceedings, and particularly in not noting in terms of the 25th rule of the Resident Magistrate's Court, the objections upon which the evidence tendered by the prosecutors was rejected by the Magistrate. And that, as to the statement of the proceedings, the record seemed to him doubtful as to what this Court on review had to adjudge. Although upon the case as now opened before the Court, he certainly considered the case as one which, from its nature, was beyond the jurisdiction of the Resident Magistrate's Court, and that if any Court in the Colony were, the Supreme Court was the only Court competent to ascertain and decide such a case.

The Court affirmed the judgment of the Resident Magistrate complained of, with costs.

MYBURGH AND OTHERS, APPELLANTS, *vs.* CLOETE RESPONDENT.

Jurisdiction of Resident Magistrate as to rights of water.

1848. March 1.

Myburgh and Others, Appellants, *vs.* Cloete, Respondent.

In this case, the respondent had brought an action before the Resident Magistrate of Stellenbosch, against the defendants, for £5 damages, which he claimed from them "because and by reason of their having wrongfully obstructed, at and for some time past during the present summer season, a certain stream of water known by the name of the Eerste River, running alongside of or near to the land of the defendants, towards the land of the plaintiff, by the construction of a dam or dams, and the laying of stones therein above the land of the said plaintiff, and thereby diverting the said stream, or a great part thereof, from and out of its usual course, whereby the plaintiff was deprived of the proper use of the said stream, to which he is of right and usage entitled," &c.

The defendants appeared, and objected against the jurisdiction of the Court, on the ground that the right to the water is in dispute, and quoted the Rules of the Magistrate's Court and the Schedule thereunto annexed, p. 139.

The plaintiff's agent maintained that the case is fully cognizable before the Magistrate's Court, as damages only are sued for, the right to the stream not being disputed.

The defendants' agent replied that he is summoned for damages for having "wrongfully" obstructed the stream.

The Court overruled the exception to its jurisdiction.

The plaintiff's witnesses proved the existence of the dams, stones, &c., and the diversion of the stream from its channel, which the defendants did not deny, but called a witness who proved that he had been the former proprietor of the place, and had sold it to the defendants in February, 1846; that, upwards of seven years before, he had made the cut leading the water from the river, as he maintained he had a right to do, and had continued ever since, until he sold the place, to lead water from the river, as the defendants had since done; that the plaintiff had never interrupted him in, or complained of, his doing so.

The Resident Magistrate gave judgment for the plaintiff. Damages, £5 and costs.

The appellants brought this judgment under review, on the ground that the Magistrate had no jurisdiction to hear and determine the cause, by reason of a right to water being in dispute between the parties in said cause.

After hearing the counsel for the parties, the Court held that the Magistrate had done right in overruling the objection to his jurisdiction in the first instance, because the

bare allegation of a defendant sued for damages for a particular act done by him, that a right was in dispute, ought not to be sustained as sufficient *per se* to oust the jurisdiction of the Magistrate; but that in respect that the evidence produced by the defendants clearly proved that the right to the water was the question at issue between the parties, the Magistrate ought, after it was given, to have dismissed the case as being beyond his jurisdiction. They, therefore, reversed his judgment, and dismissed the case with costs in both courts.

1848. March 1.

Myburgh and Others, Appellants *vs.* Cloete, Respondent.

PALM *vs.* SIMPSON.

Jurisdiction of Supreme Court. Edictal citation.

Where P. had sold to S. certain landed property situate within the Colony, purchase price to be paid within the Colony, and S. failed in payment, P. summoned S. (who was resident out of the Colony) by edictal citation for the balance of purchase money, and alternatively the rescission of the contract. HELD, *that no personal action lay, but that rescission of the contract itself could be declared.*

The defendant in this case, who was absent from the Colony, had been duly summoned by edictal citation in the usual form. The plaintiff's intendit and declaration set forth, that on the 23rd July, 1846, the plaintiff and defendant entered into a written contract, whereby the plaintiff agreed to sell, and the defendant agreed to purchase, and did purchase, from the plaintiff, certain two farms therein named, both situated in this Colony, for the price of £2,550 which the defendant, by the said contract, bound himself to pay at Cradock to the plaintiff, by certain instalments therein specified;—the first instalment of £375 to be paid at the expiration of one year from the date of the contract, viz., on the 23rd July, 1847; but that the defendant did not pay the same when it became due, by reason whereof the plaintiff, offering on his part to perform all that by the contract he had bound himself to perform, prayed that the defendant should be condemned to pay to the plaintiff the said sum of £375, together with interest and costs.

2ndly.—That in case the said defendant should fail to do so within a reasonable time, to be fixed by the Court, the plaintiff prayed that the contract should be declared by this Court to be rescinded.

Aug. 1.

Palm *vs.* Simpson.

1848. Aug. 1.

Palm vs. Simpson.

Ebden appeared for the plaintiff, but no appearance was made for the defendant.

The Court expressed their opinion that as the defendant was not within the Colony, and as no property of his within the Colony had been arrested, *jurisdictionis fundandæ causâ*, the Court had no jurisdiction to entertain any action claiming that the defendant should be adjudged to perform the stipulation of a personal contract for the payment of the price of land alleged to have been bought by him from the plaintiff; but that as the land, the contract for the sale and transfer of which to the defendant the plaintiff prayed in the second conclusion of his declaration should be rescinded, was in the Colony, the Court had jurisdiction to entertain an action against the defendant, although absent from the Colony, for the purpose of having that contract rescinded in respect of his failure to perform within the prescribed time the stipulations which he had thereby bound himself to perform. Whereupon the plaintiff withdrew that part of his declaration which prayed that the defendant should be condemned to pay him the sum of £375; and restricted the conclusion of his declaration to a claim that the contract should be declared to be rescinded in respect of the defendant's default.

The plaintiff having then put in the contract, and proved the defendant's signature to it, the Court gave judgment for the plaintiff, declaring the contract of sale to be rescinded.

SANDS *vs.* COOPER, DEPUTY ASSISTANT COMMISSARY-GENERAL.

Liability of Commissariat Department for breach of contract by its officers.

Jurisdiction. Pleading.

The Commissariat Department hired from S. a wagon and oxen. This action was brought for their restoration or for damages. Defendant, without excepting, joined issue, and pleaded payment of a certain amount, which the plaintiff maintained was insufficient. Defendant argued that it was the custom and course of business in the Commissariat Department to have claims adjusted by a special Board of Claims, which the plaintiff had declined.

HELD *by a majority of the Court* (WYLDE, C.J., *and* MENZIES, J.), *that parties contracting with the Commissariat Department are not bound, unless they have expressly or tacitly so agreed, to submit their claims, when disputed, to the final decision of a Commissariat Board of Claims, whatever may be the custom of the department requiring such submission; but may have recourse to a Court of Law for the purpose of determining such claim.*

HELD (*by the same majority*), *that defendant not having excepted to the jurisdiction, but having joined issue on the merits, could not at the trial found on non-jurisdiction, even in a case where the Court really would have had no jurisdiction, had a proper declinatory plea of non-jurisdiction been filed.*

1848. Aug. 30.

Sands vs. Cooper, Deputy Assistant Commissary-General.

The plaintiff in this case summoned the defendant, in his capacity as Deputy Assistant Commissary-General, before the Circuit Court of Albany, to show cause why he should not be adjudged to restore to plaintiff a certain wagon with gear complete, and twelve draught oxen, which had been hired from the plaintiff by the defendant in his said capacity, on the 29th January, 1847, to convey baggage from Fort Beaufort to Clanwilliam, and promised and engaged in his said capacity to return the same to the plaintiff at Fort Beaufort, or otherwise to pay the plaintiff for the same at a fair and reasonable valuation, and which wagon, gear, and oxen neither the defendant nor any person on his behalf, or for, or on behalf of, the Commissariat Department, has returned to the plaintiff; or otherwise to pay to the plaintiff the sum of £45, as the value of the wagon and gear, and £72 as the value of the oxen, and also the further sum of £117 for the hire of the wagon and oxen from the 22nd May, 1847, to the 26th March, 1848, at 7*s.* 6*d. per diem*, or as damages incurred by the plaintiff by having been deprived of the use of his said wagon and oxen, and of the profits which would have accrued to him during the said last-mentioned period, had the wagon and oxen been returned to him in due time, according to the defendant's contract with him.

The defendant pleaded,—1st, the general issue; 2nd, Should the plaintiff succeed in proving his allegation, and not otherwise, that the plaintiff has already been paid the full amount of the hire from the time of hiring to the 22nd May, 1847, being the total amount of wagon-hire to which the plaintiff is entitled; and that as to any additional claim for hire, and as to any claim for compensation in respect of the loss of the said wagon, the defendant

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has been and is ready and willing and hath tendered to the plaintiff any sum which may be awarded to the plaintiff as due to him for such claims by a certain board entitled a Board of Claims, which has been constituted for the consideration of such claims, according to the custom and general course of business of the Commissariat Department in such cases.

At the trial it was admitted that plaintiff had been paid the hire of the wagon on the 22nd May, 1847, being the day on which Wood's wagon returned from Clanwilliam to Fort Beaufort.

The plaintiff put in the following document:—

"The wagons belonging to W. Sands and Wm. Wood, employed in the conveyance of the baggage of the Clanwilliam burghers from Fort Beaufort to Clanwilliam, are engaged on the following trems, viz.:—Payment to be made at the rate of 15*s.* *per diem* so long as the wagons are employed in the service above stated, including a reasonable time returning to Fort Beaufort; and the wagon with oxen complete according to the number received, to be returned to the proprietors, or payment for the oxen at a fair valuation to be made."

"Commissariat Office, Fort Beaufort,
"29th January, 1847,

"(Signed) WM. R. COOPER, D.A.C.G."

At the foot of the document the following certificate was written,—

"Certified that neither wagon nor oxen have been returned to the proprietor, and that he is entitled to compensation for them. The wagon has been sold at Clanwilliam by the Civil Commissioner, for the sum of £16 3*s.* 0½*d.*

"Graham's Town, 9th Aug., 1847.

"(Signed) W. GREEN, D.C.G."

The defendant admitted the signatures of the above document and certificate.

Plaintiff called several witnesses, one of whom stated that he knew the wagon and had seen it before it started, and thought it worth £50, but admitted that he had signed a certificate valuing it at £45, because the plaintiff would be satisfied with that amount.

The others stated that the value of the oxen was from £4 to £6 each, and that in January, 1847, that was the common price of oxen.

The plaintiff closed his case.

The defendant put in the *Graham's Town Journal* of the 7th November, 1846, and 2nd January, 1847, in which was inserted the following notice:—

"BOARD OF CLAIMS.

"Notice is hereby given that a Board of Claims sits daily until further notice (Sundays excepted) at the Orderly Room in the Drostdy Barracks, between the hours of 11 o'clock in the forenoon and 2 o'clock in the afternoon, for the purpose of investigating claims to compensation for losses of oxen, &c., which have accrued to civilians while engaged in military services.

"Parties intending to prefer claims are requested to provide themselves with full proof of their losses.

"(Signed) JAMES D. WATT, Asst. Com.-Gen.

"Commissariat Office, Graham's Town,
"6th November, 1846."

Also, the *Graham's Town Journal* of the 25th March, 1848, in which was inserted the following notice:—

"COMMISSARIAT.

"COMPENSATION FOR LOSS OF WAGON, OXEN, &c.

"The undersigned persons are hereby informed that compensation has been awarded to them for losses sustained by them of wagons, oxen, &c., during the war with the Kafir tribes between the months of April and December, 1846, and which will be payable at this office on the 5th April next."

(Here follows a list of 246 names.)

"Persons not well known in Graham's Town are requested to provide proof that they are entitled to receive the sums claimed.

"(Signed) W. GREEN, Dep. Com.-Gen.

"Commissariat Office, 23rd March, 1848."

The defendant also put in a letter from him to plaintiff, informing him that for want of oxen his wagon would be sold at Clanwilliam, "and compensation for the same awarded to you; hire being of course granted for the time considered reasonable by the Board of Claims making such award."

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Letter from defendant to plaintiff, dated 5th July, 1848:

"SIR,—In reply to your letter of the 1st instant, I have to apprise you that I was called upon, on the 8th June, to explain under what circumstances your wagon had been hired, which I did; and the matter is, I understand, now pending the decision of the Secretary to Government. I shall, however, forward your letter to Dep. Com.-Gen. Green."

Letter from defendant to plaintiff, dated 7th August, 1848:—

"SIR,—With reference to your wagon, &c., I have the honour to request that you will submit your claims for payment for the same, mentioning the value you place upon the wagon and oxen, &c., to the board now assembled in Graham's Town for the investigation of such matters, of which Major Yarborough, 91st Regt., is president."

It was admitted that on the 9th August, 1847, plaintiff sent in to defendant a claim in writing, in which, as ultimately altered, he claimed for hire—

From 29th January to 22nd May, at 15*s.* per diem	£85	10	0
For ditto from 22nd May to 9th August, at 7*s.* 6*d.* per diem	29	12	6
For wagon and gear	45	0	0
For 12 oxen at £6 each	72	0	0
	£232	2	6

Defendant put in letter from him to plaintiff, dated 30th December, 1847:—

"SIR,—I have the honour to hand you an extract from a letter I have received from Dep. Com.-Gen. Green, and am prepared to pay you hire for your wagon, as therein pointed out."

Also the extract referred to in said letter of 30th December, with which was also enclosed to plaintiff the following extract from letter No. 145, from Com.-Gen. Palmer, to Dep. Com.-Gen. Green:—

"The hire must be paid for the number of days occupied by the journey to, and for such period as may be a reasonable allowance for returning, which will be sufficiently indicated by that occupied by the other wagons employed on the same service, which returned with Capt. Millard; and there will be no occasion for bringing that portion of the claims of Mr. Sands before a board of claims; but, as

regards compensation for his wagon and oxen, that course having been contemplated when his wagon was engaged, you will be pleased to take the requisite steps for having it brought before a board as early as possible."

William R. Cooper, the nominal defendant, was then called and examined:—I am a Deputy Assistant Commissary-General, and was stationed at Fort Beaufort in January, 1847, where I entered into the contract with plaintiff for the hire of his wagon and oxen. The hire of them up to the 22nd May, 1847, the day when Wood's wagon returned there, was paid to him in February, 1848. I could not pay the value of the wagon and oxen claimed by him without referring it to a board of claims. I was impressed that I could not pay without positive orders. My instructions were given me by Mr. Green.

Cross-examined:—I have been at Fort Beaufort for two years and six months. No board of claims sat there during that period. The board of claims was constituted by the Commander of the Forces. The members were changed at different times. There were different boards constituted at different times. I have no recollection of any mention being made of a board of claims to plaintiff when I hired his wagon. I do not recollect plaintiff ever telling me why he would not go before the board; he only said he would not go, and had nothing to do with the board.

The defendant called Deputy Commissary-General Green:—I am in charge of the Commissariat Department on the Eastern Frontier. Claims for wagon losses on military service have always been referred to a board of claims. I never heard of any person objecting to go before the board except the plaintiff. I took charge in February, 1847. A great many persons have made claims for losses since I took charge, and are continually going before the board. It has been notorious for a long time that such is the custom of the department. In fact, the Commissariat are debarred from paying any claims of an extraordinary nature without the sanction of the Commander of the Forces. This is among the general instructions to the Commissariat, and the Lords of the Treasury have desired that such claims shall be referred to a board of officers to be appointed under the authority of, or by, the Commander of the Forces. I did not myself know of these instructions till about two months since. I never threw any doubt upon plaintiff's claim, and was thoroughly satisfied that if he had gone before the board he would be paid for his wagon and oxen. I am not aware of any impediment in the plaintiff's way to obtain payment if he had taken the ordinary course of proceeding, of going before the board. I had no power

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to pay him if he did not do so. Not in respect of any general order expressly applicable to any claim similar to his, but because such a claim as his is considered by the service to be a claim of an extraordinary nature, even though it is founded on a stipulation in the agreement, and I cannot pay any claims of an extraordinary nature without their having been submitted to a board of claims. Hire I consider an ordinary claim, and that was why we paid the plaintiff the full amount of hire paid on Wood's claim. There is no standing board of claims; they are erected from time to time by order of the Commander of the Forces, and when the claims are brought to a close there is an order for their dissolution. Plaintiff never gave me any reason why he did not go before the board. I never had any direct communication with him, as far as I recollect.

The defendant closed his case.

Ebden, for the plaintiff, maintained, — 1st, That the plaintiff was not bound to go before the board of claims, and that when the plaintiff sent in his claim the defendant was bound to tender a reasonable amount, if not what was demanded; but defendant had tendered nothing. 2nd, If the defendant had asked for some account of the amount claimed as losses, the plaintiff was not bound to furnish any such information. 3rd, After the claim sent in, the defendant was bound to send in a valuation, and, referring that to the board, to cite the plaintiff before it. 4th, A board of claims has not been proved to have been sitting, to which this claim could have been referred. 5th, General Orders of the Commander-in-Chief do not bind courts of law or suitors in court with whom express contracts have been entered into between the suitors and the Government. 6th, If a board chose to award a very small sum less than the claim, the claimant could not be barred from preferring his whole claim to a court of law.

Watermeyer, for the defendant, argued *contra*.

By consent of both parties, the case was removed to the Supreme Court.

This day, the cause was argued in the Supreme Court, when *Ebden*, for the plaintiff, repeated the arguments urged by him before the Circuit Court.

The *Attorney-General*, for the defendant, argued *contra*, and maintained that the claim of the plaintiff was one of an extraordinary nature. That the Commissariat Department were prohibited by their instructions from paying any claims of an extraordinary nature made against it, until the same had been investigated and decided on by a board of officers. That it was notorious that this was the custom and rule of the service; and, therefore, that the plaintiff,

in entering into the agreement with the defendant of the 29th January, 1847, must be held to have contracted and agreed that, if his wagon and oxen were not restored to him, he should be paid in lieu thereof such amount as should be awarded by such board as a fair and reasonable valuation for the same.

MUSGRAVE, J., was of opinion that, for the reasons stated by him in giving judgment in the case of *Prince, Collison, & Co.* vs. *Palmer*, on the 12th July, 1847, no Court in this Colony had jurisdiction to entertain and determine any suit or action brought by any person against any officer of the Commissariat Department, in his capacity as such, in respect of any contract made by him or any other officer of that department, for or on account of the department; and that, therefore, the Court were bound to dismiss this action as being *ultra jurisdictionem* of the Court; notwithstanding that the defendant had not pleaded the declinatory exception that the Court had no jurisdiction, had joined issue with the plaintiff on the merits, and had not, up to the stage in which the cause now stood, in any way excepted against, or objected to, the jurisdiction of the Court.

WYLDE, C.J., and MENZIES, J., held that, as the defendant had not pleaded any exception to the jurisdiction, but had joined issue with the plaintiff on the merits, he had thereby submitted himself to the jurisdiction of the Court, and which, therefore, the Court were now entitled to exercise, even although the defendant would have been exempt from the jurisdiction of the Court if he had excepted to it in due time—a right of exemption which, however, they were not at present prepared to find that the defendant in virtue of his office possessed. That whether, in the event of the Court giving judgment for the plaintiff and the Commissariat Department, or the Lords of the Treasury, refusing to pay the amount awarded by the Court, the Court could, by any process it could issue, compel payment to be made to the plaintiff or not (a question which it was time enough to decide when the plaintiff applied to have process of execution issued), the plaintiff had a clear and undoubted right to have the just amount of his claim ascertained, and his debt constituted, by the judgment of the Court, more especially as there was no ground for believing that any department of Government would refuse to pay the amount of a claim which had been found and declared to be just and legal by the judgment of this Court. That it had been proved that there was a rule established in the public service that officers of the Commissariat should not make any voluntary payment of any claim of an

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extraordinary nature before such claim had been submitted to a board of officers. But, although this might be a very expedient regulation for the service, and be binding on all its officers, claimants were not in consequence of it legally bound either to appear before such board or to abide by its decision as to the amount of their claim, but were entitled, if payment of the amount claimed was refused, to have recourse to legal proceedings in any competent Court, unless they had either expressly or tacitly bound themselves, when they made these contracts with the Commissariat, to submit their claims under those contracts to the decision and award of a board of officers. That the agreement between the plaintiff and the defendant contained no such express obligation on the part of the plaintiff, and that there were no circumstances in the case from which any tacit or implied agreement to submit his claims to the decision of a board of officers could be inferred. There was no proof that he knew of the existence of any such regulation when he made the contract; and even if he had known it, he would have been justified in considering it as a rule intended only for the regulation and guidance of the Commissariat officers, and not intended to apply to or bind third parties. They held that the defendant ought to have submitted the plaintiff's claim to the board, and then made him a tender of the amount considered to be due to him. They held that at the end of the journey the value of the wagon might be justly estimated at £40, and of the twelve oxen at £4 each, and that the plaintiff having been paid the stipulated hire for the full period agreed on in the contract, and being now awarded the full value of his wagon and oxen at the expiration of that period, was not entitled to claim any further amount for hire.

On these grounds, they gave judgment for the plaintiff for £88, and costs.

LEE & MEURANT *vs.* DANIELL'S TRUSTEES.

Auctioneer's commission on withdrawal of a sale in insolvency. Trustee, employment of auctioneer by, without assent of his co-trustees.

Where a sale was withdrawn from an auctioneer (employed by one only of three co-trustees, the other two afterwards objecting to his employment), and entrusted to another auctioneer who held the sale, the first auctioneer protesting: HELD, *that such first auctioneer was not entitled to commission on the full sale, just as if he had conducted it.*

The facts of this case were as follows:—

The defendants, R. J. Jones, R. W. Eaton, and Henry Nourse, were the trustees in the insolvent estate of R. Daniell.

It having being resolved that a sale by auction should take place of the insolvent's movable and immovable property, Mr. Nourse, without the previous knowledge or consent of his co-trustees, entered into a negotiation with plaintiffs as to the terms on which they, as auctioneers, would conduct the sale; and on the 15th May, 1847, agreed with them that they should hold the sale on certain terms. The plaintiffs accordingly inserted several times in two of the Graham's Town papers an advertisement of the property, which it was not denied had been drawn up for that purpose, either by the trustees or the insolvent, and in which they announced themselves as the auctioneers who were to hold the sale. They also wrote several circulars to Dutch farmers announcing the sale.

Immediately on receiving information of the employment of the plaintiffs by Mr. Nourse, his two co-trustees refused to consent to the arrangement, and insisted on the employment of Mr. Harries as auctioneer, on the ground, as was alleged, of the very great amount of the estate (it realized £13,400) and the inexperience of the plaintiffs as auctioneers, their first licence as such bearing date in March, 1847.

On the 17th of June, Mr. Nourse wrote to the plaintiff Meurant the following letter:—

"Port Elizabeth, 17th June, 1847.

"Having conferred with Mr. Jones since his arrival in the steamer, I find all my endeavours in your favour frustrated and overpowered by my two co-trustees, who insist upon Mr. Harries being the auctioneer for the sale.

"Finding myself thus overpowered, I have nevertheless secured for you the following commission: Mr. Harries agrees to pay you one per cent. (1 per cent.) on the amount of the movable property sold at the sale, belonging to the estate; and although this is not accompanied with any direct stipulation for your assistance, it is nevertheless hoped that you will give him the benefit of your assistance at the sale, in reading and explaining the conditions of sale to the Dutch buyers, and in getting in such acceptances as may be more immediately in your part of the Eastern Province.

"Trusting that these terms may be satisfactory to you, and adding my own particular request that you will give me the benefit of your attendance and influence,

"I remain, &c.,

"HENRY NOURSE."

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"Mr. Harries requests me to add that he thinks he will be meeting your wishes by inviting you to take a part in the proceedings of the day in the manner before stated; and the whole of this arrangement may, if you prefer it, be kept to ourselves."

The plaintiffs, on the 19th June, in reply, wrote a letter to Mr. Nourse, in which they refused to accept the terms proposed by him, and stated that they would be prepared to hold the sale on the 23rd and 24th of June, as advertised; that they would be prepared to do all they had undertaken to do on the day of sale; and that should they be injured either in pocket or reputation, or both, they would seek their remedy in the proper quarter.

On the 23rd June, notwithstanding Mr. Nourse's letter of the 17th, the plaintiff Meurant attended at the place of sale, and, both in a letter to the defendants and verbally in presence of the bystanders, protested against the sale being held by any other auctioneer, and notified his intention of holding the defendants liable for all losses, &c., which the plaintiffs might suffer by reason of the defendants employing another auctioneer. At the same time, he stated that, although he made this protest, he had no desire to injure the sale, and assisted Mr. Harries, the auctioneer, in explaining the conditions of sale to the Dutch farmers present.

On the 2nd and 7th August, Mr. Nourse wrote to the plaintiffs, offering them one per cent. on £5,068 14*s.* 5*d.*, being the amount of the gross proceeds of the movable property, which Mr. Harries had agreed to allow out of his commission, and a bonus of £25 from the estate; and afterwards on the 7th September, before the commencement of the suit, tendered £80, which the plaintiffs refused.

In their declaration, the plaintiffs alleged that the defendants had entered into the agreement with them (which, in point of fact, had been entered into only by Mr. Nourse)—that the plaintiffs had done all that was required on their part for the conduct of the sale, and were ready and willing to conduct it, attended at the time and place fixed for it, and had given notice thereof to defendants, who would not suffer them to conduct the sale, whereby the plaintiffs have lost great gains and profits which would otherwise have accrued to them from the conduct of the sale, and suffered damage to the amount of £300. Wherefore they prayed judgment for that sum, and costs.

In their plea, the defendants denied that the plaintiffs had sustained any damage exceeding the sum of £80; and as to it, protesting that the plaintiffs did not actually sustain

damages to that amount, they had notwithstanding, in order to avoid litigation, before the commencement of the suit, tendered £80 as and for the damages, which sum they are still ready to pay to them.

The cause was removed to the Circuit Court of Albany.

The plaintiffs then called five witnesses, all of whom were, or had been, auctioneers on the Frontier. None of them proved that there was any custom or usage of trade regulating the amount to which an auctioneer was entitled when, after being employed to conduct a sale, it had been withdrawn from him and given to another; nor, indeed, that any such case had ever come within their knowledge; but four of them expressed their opinion that under the circumstances the plaintiffs were entitled to the full commission as if they had held the sale; and one, that they were entitled to half the full commission.

The case was removed back to the Supreme Court, when the defendants called Messrs. J. G. Steytler and A. Bartman, auctioneers, and B. Norden, who had been auctioneer in Graham's Town. The two former knew of no instance of any similar case having occurred, but both were of opinion that the sum tendered was a very liberal offer, and that they would have been glad to take it, seeing that, although they lost the *del credere* commission, they were saved from the trouble attending the sale, and the responsibility of collecting the amount of the vendue roll.

Mr. Norden stated that he was of the same opinion, and never had a sale entrusted to him which he would not willingly have taken £50 to give up, and be freed from the risk. That he had once been employed to hold a sale, and on going to the place of sale, at some distance in the country, he found that without any notice to him another auctioneer had been employed, and had commenced the sale. That he had felt hurt, and had insisted on the trustee who had employed the other auctioneer publishing an apology in the newspapers, and paying £10 to a charity, which was done.

Ebden, for the plaintiffs, quoted *Stevens' Nisi Prius, 3d vol. p.* 2,946; and referred to the commercial usage or custom, by which, when goods are conveyed to and received by a merchant for sale, and afterwards withdrawn from him before sale, he is held entitled to his commission of 2½ per cent.

The *Attorney-General* and *Watermeyer* argued *contra*.

The Court held that the amount tendered was much more than the plaintiffs had any right to claim; but as £80 had been tendered they gave judgment for the plaintiffs for that sum, and condemned the plaintiffs to pay the defendants' costs.

MUNICIPALITY OF SWELLENDAM *vs.* SURVEYOR-GENERAL.

Right of inhabitants of Municipalities to common pasturage, Ordinance No. 9, 1836, Section 45.

The 45th section of Ordinance 9 of 1836 does not vest in the Commissioners of a Municipality all lands within the local municipal limits not granted to private persons before the creation of the Municipality.

Common rights to land can be acquired without any formal written grant from the Government.

Land in the vicinity of a village "appropriated, set apart, and from time immemorial recognized as the common pasturage ground of the village," is land to which the inhabitants had acquired a right of common pasturage, the right of property in which, or at least the right of servitude over which, is vested in Municipal Commissioners by virtue of the 45th Section of Ordinance No. 9 of 1836, and irrevocably so vested, so that the Government is completely divested of the power of alienating the land, at least in such a way as to impair or infringe upon the right of common pasturage.

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By a proclamation of the Governor, six lots of ground situated within the local limits of the Municipality of Swellendam were advertised for sale; and notwithstanding the remonstrances made by the Commissioners in a correspondence with Government, and a formal protest made by one of the Commissioners at the sale, these six lots were sold.

The Commissioners then applied to the Judge at Chambers for an interdict restraining the Surveyor-General from issuing any grants or titles of or to the said lots to the purchasers thereof, or to any other persons. This application, being supported by affidavits that previously to the erection of the Municipality those lots formed part of the common property of the inhabitants of Swellendam, and consequently, on the erection of the Municipality, became, by virtue of Ordinance No. 9, 1836, section 45, vested in the Commissioners thereof, was granted, in order that the question as to the respective rights of the Government and of the Commissioners to these lots might be decided by an action.

The Commissioners, therefore, brought this action, and in their declaration alleged that the inhabitants of the Municipality of Swellendam had acquired, and had at the

time of the sale thereof, and long previously, to wit for the space of fifty years and upwards, a right of common, or a common right, to the said lots of land. And that the said lots so situated, and being within the local limits of the Municipality as established by a proclamation of the Governor, published in the *Government Gazette* of the 17th November, 1843, were indispensable as pasturage for the cattle of the inhabitants of the said Municipality; and, further, that by the 39th and 45th sections of the Ordinance No. 9, 1836, and by the Ordinance No. 8, 1848, the property of all lands to which the inhabitants of any Municipality shall at any time have or acquire a common right shall be vested in the Commissioners of such Municipality for the time being; and that the said lots of land were, at the time of the sale, legally vested in the plaintiffs as such Commissioners aforesaid; and that His Excellency the Governor had no legal right or authority to make or order the sale thereof.

Wherefore the plaintiffs prayed that the defendant, in his capacity of Surveyor-General, should, by the judgment of the Court, be restrained and interdicted from issuing any titles to the said lots of land to the purchasers thereof, or to any other person or persons whatsoever, and be condemned, in his said capacity, to pay the costs of this suit.

The defendant pleaded the general issue.

It was admitted that the six lots of land were situated within the local limits of the Municipality of Swellendam, as defined by the proclamation referred to in the declaration. That one of them was bounded on one side by the main street of Swellendam, and on two other sides by erven lying contiguous to, and bounded by, the said street. And that the other five lots, which lay contiguous to each other, and measuring in all about four morgen, were situated between the Kornlands River and certain erven situated on the lower side of, and bounded by, the said main street, and that the lower boundaries of said erven formed the upper or northern boundaries of the said five lots.

The plaintiffs, *inter alia*, put in an admitted extract from the Record Book of the Landdrost and Heemraden of Swellendam, dated 27th December, 1821, and 8th January, 1822, which was as follows:—

"The pasturage belonging to the village, not being of such an extent as to allow an unlimited number of cattle to graze thereon, it shall be permitted to every owner of an erf in this village to send into the said pasturage of the village —(16) sixteen oxen, (6) six cows and calves, (8) eight wagon horses, (3) three saddle horses, (25) twenty-five sheep and goats. Whilst all the cattle above this number, belonging

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to one person, found in the said pasturage may be sent to the pound by any one," &c., &c.

And a letter dated 20th February, 1822, from the Secretary of Government to the Landdrost and Heemraden, in which he stated that he was directed to convey to them His Excellency the Governor's approval of the above regulation of the 8th January, 1822.

The plaintiffs called four witnesses to prove that, previously to the erection of the Municipality in 1833, the inhabitants had exercised the right of pasturing their cattle in common over all the ungranted Government land in the neighbourhood of the village. 2ndly. That certain portions of land called Poespas Vlei, Zande's Vlakte, and Kornlands River Vlei, had been by Government expressly appropriated and recognized from time immemorial as the common pasturage land for the cattle of the inhabitants of the village of Swellendam. 3rdly. That five of the lots in question formed part of the common pasturage of Kornlands River Vlei. 4thly. That it was during summer the best portion of the pasturage, and as such the continued use of it was absolutely necessary for the grazing of the cattle of the Municipality.

The defendant called four witnesses to prove that no particular portion or portions of land had ever been appropriated or recognized by the Government or by any one as the common pasturage land of the village. That the inhabitants, without having any right, title, or authority whatever to do so, had been in the practice of allowing their cattle to graze over any convenient part of the ungranted Government ground in the neighbourhood of the village without hindrance, solely because, until Government thought fit to dispose of any part of that ungranted land, it had no interest in preventing its being depastured. That even if any part of Kornlands River Vlei could be held to have been appropriated as common pasturage, the five lots in question formed no part of such pasturage, which, if it existed at all, was confined to the south side of the river That these five lots had always been considered as part of the village itself, and that its use was not at all necessary for the grazing of the cattle of the Municipality.

The plaintiffs and defendant respectively maintained that the evidence had established the facts above mentioned as alleged by them respectively. And further, *Ebden*, for the plaintiffs, maintained, that according to the true construction of the 45th section of Ordinance No. 9, 1836, the property of every portion of Government land situated within the local limits of this Municipality which had not been expressly granted by Government to private persons

before the creation of the Municipality became instantly on its erection vested in its Commissioners, by virtue of the provisions of that section.

On the other side, the *Attorney-General*, for the defendant, maintained that the legal effect of the 45th section was not to create any new title to land, or to transfer from Government to the Commissioners the property of any land which previously to the erection of the Municipality had belonged to Government, but merely to transfer to the Commissioners the property of any land to which previously to the erection of the Municipality the inhabitants thereof had acquired a common right. That the inhabitants of Swellendam had never acquired a common right to any land whatever, because they could not plead prescription against the Crown, and because, by the law of this Colony, the Government can only divest itself of, and transfer to any person or persons, the property of any Government land, by a formal written grant, and the plaintiffs by their own admission could not produce any such written grant of any lands whatsoever.

Postea (December 30, 1848).—The Court gave judgment for the defendant, with costs.

The Court held that the proposition maintained by the plaintiffs, that the provisions of the 45th section of the Ordinance had the effect of vesting in the Commissioners all the property of the Government land situated within the local limits of the Municipality, which had not been granted to any person before its erection, merely because the cattle of the inhabitants might sometimes have grazed or passed over it without hindrance, was utterly groundless; while, on the other hand, the extreme position maintained by the defendant that the inhabitants of Swellendam, because they had not got any formal written grant of any land from Government, therefore could not have acquired from Government, previous to its erection as a Municipality, any common right whatever to any land, was equally untenable; for even admitting, for the sake of argument, that in no case could prescription be pleaded against the Crown, and that the only mode in which, by the laws of the Colony, the *dominium* or absolute right of property of any land belonging to Government, and previously ungranted, can be transferred to any person or community of persons, is by a formal written grant; yet no rule has been established as to the mode by which the Government may effectually constitute, either in favour of an individual or of a community, a servitude of pasturage or any other kind of real servitude over land, the *dominium* of which is in the Crown. That it has been

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proved by the parole evidence in this case that some known and certain portions of Government land (the extent of limits of which could at any time, if disputed, be ascertained and defined by parole evidence) in the vicinity of the village of Swellendam had been by Government, through its executive officers, appropriated, set apart, and from time immemorial recognized as the common pasturage ground of the village of Swellendam. That this is proved still more clearly and indisputably by the regulations of the Board of Landdrost and Heemraden, confirmed by the Governor, which had been put in by the plaintiffs.

That if this document should not be construed as an acknowledgment by the Government of the previous constitution of a servitude of common pasturage in favour of the inhabitants of Swellendam over certain Government lands in the vicinity of that village, its terms were sufficient *per se* to constitute such a servitude. That so soon as these regulations had received the confirmation of the Governor, they had the force of law, until revoked or repealed by competent authority; that they had not been so repealed or revoked previously to the erection of the Municipality of Swellendam, and, consequently, that at the period of its erection the inhabitants had acquired and possessed a common right of pasturage over the said lands, the right of property in which, or at least the real right of servitude over which, by virtue of the 45th section of the Ordinance, was immediately vested in the Commissioners, and thus (even if it could previously have been revoked by Government) rendered irrevocable except by an act of the Legislature, so that the Government was completely divested of the power of alienating the said land, at least in such a way as to impair or infringe on the said right of servitude of common pasturage. That it was unnecessary for the Court now to ascertain or decide what are the extent and limits of the lands over which the said right of servitude had been constituted, because the evidence had proved to the satisfaction of the Court that none of the six lots in question had ever formed part of the common pasturage land of the village of Swellendam, and consequently that they remained the property of, and at the absolute disposal of the Government, by sale or otherwise.

The Court expressed an opinion that, as the necessity of legal proceedings in this case had been probably occasioned as well by the extragavant pretensions of Government that the village of Swellendam had acquired right to no common pasturage land whatever, as by the equally extragavant claim set up by the plaintiffs to all the ungranted Government ground within the local limits of the Municipality,—and as the result of this action would most probably prevent

the necessity of any legal proceeding between the Government and other Municipalities, which must otherwise in all probability have been resorted to,—Government might, on these grounds, see sufficient cause for not enforcing the decree for costs against the plaintiffs.

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BERGH AND WIFE *vs.* SMUTS AND WIFE.

Citation to institute action. Perpetual silence.

On a citation to institute action, or be barred by perpetual silence, it must be shown that the respondent "publicly" pretended to have a right of action.

1835. Aug. 11. Bergh and Wife vs. Smuts and Wife.

In this case, a summons had been served on the defendant, calling him on this day to show cause why he should not, within a certain time, institute an action which he pretends, and did on or about the 25th day of April last, pretend to have against the plaintiff, Mrs. Bergh, for an inventory of the property left by her former husband, the father of the defendant's wife, Mrs. Smuts, &c., &c., and also for an account and settlement of the paternal inheritance due to the said defendants, and which action he neglects to bring, yet refuses to abandon, and why he shall not be compelled to bring such action, within six weeks from the 11th of August next, in the Supreme Court, or in default thereof be barred therefrom, and perpetual silence imposed on him.

In support of the conclusions of the summons, the plaintiff quoted *Van der Linden*, p. 426.

The defendant objected to the application, and some discussion took place as to whether an application of the kind was competent, with reference to an action of that particular nature, which it was here alleged that defendant had pretended to have against the plaintiffs.

But the Court, without giving any decision on that question, dismissed the application, on the ground that the plaintiff had failed to verify that defendant did *publicly* pretend to have any such action against plaintiffs. (See *Van der Linden, p.* 425.)

Costs reserved until it should be seen whether defendants would consent that a certain bond, referred to in the proceedings, should be cancelled.

In re Valentyn *vs.* Swartz, Ex parte Brink.

Execution Sale. Auctioneer's Commission.

Where an express contract as to commission has been made between a Resident Magistrate, as representing the Master, and an auctioneer, the Court, on the repudiation of such contract, has no means of affording relief, except by regular action between the parties.

1842. May 18. — *In re* Valentyn *vs.* Swartz, *ex parte* Brink.

In this case, it was decided that the Court—on a motion made by the auctioneer to review the taxation of the Master of the expenses of selling by auction real property, taken in execution of a judgment of the Supreme Court, and sold by the auctioneer under an express contract with the resident magistrate, the commissioner appointed to carry through the sale, that he should be paid five per cent. as his fees—had no jurisdiction to decide between the auctioneer on the one hand and the plaintiff, or the defendant, or the Master, or the resident magistrate, what amount of fee the auctioneer was entitled to claim; and that his remedy, if his claim were disputed—as in this case it had been by the Master, who had allowed in his taxation only one per cent., which was the amount usually paid to auctioneers, and formerly to the applicant—was by action against the plaintiff, *and* or *or* the resident magistrate, or the Master; and dismissed the motion with costs.

No opposition was made by, or appearance for, the defendant, whose property had been taken in execution, and so sold.

Langley *vs.* Miller.

Acquisition by occupancy. Animals feræ naturæ.

Property in a whale killed by two parties unconnected with each other, in one of the bays of the Colony, is to be decided by the principles and rules of the Roman-Dutch law respecting the acquisition of animals feræ naturæ, and not by regulations regarding whale fisheries in other parts of the world.

A whale mortally wounded so as to render it unable to keep the sea, and so mastered as to make it impossible for it to escape from the person who has mortally wounded it, is the property of that person. Assistance given in such cirbumstances does not entitle the person assisting to any share in the whale. Where assistance had been

rendered, and without such assistance the whale might possibly have escaped, the majority of the Court (WYLDE, C.J., *and* MUSGRAVE, J., MENZIES, J., *dissenting*), *being unable to estimate the value of such assistance, awarded to each party half the net proceeds of the whale.*

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Langley vs. Miller.

In this action the plaintiff claimed the value of a whale, alleging in his declaration that the defendant had wrongfully and unlawfully taken, seized, and carried away and converted to his own use the dead body of a whale, killed by the plaintiff, and his property, and in his possession. The defendant pleaded the general issue.

The following were the facts of the case:—

Early on the morning of the 26th September, 1848, a whale with her calf was seen in Simon's Bay by the defendant, who went out from Miller's Point with his two whale-boats in chase, and the harpooner of the boat in which the defendant was not, succeeded in harpooning her, and thus got fast to her; after which he wounded her repeatedly with a lance. After this boat had been fast to the whale for about an hour and a half, the fish swam to the anchorage of the men-of-war, and, with the boat still fast, passed slowly among them, and then swam to the shallow water under the North Battery. The plaintiff, who lived at Kalk Bay, having observed that, after the defendant's boat had got fast to the whale, her calf was swimming about near her, loose, put off from Kalk Bay with his two whale-boats, and came up to where the whale, with the defendant's boat fast to her, was, near the North Battery, and, either voluntarily or at the request of the defendant, thrust a lance into her, the line fast to which was broken by the rolling of the whale, and then with another lance stabbed her either once or twice. It was admitted that in doing so, as the defendant's boat was still fast to the whale, he acted solely for the benefit of defendant, and that, had he killed her by these lance wounds, he would have had no claim to any share in the whale. Plaintiff and his boats then backed off, and succeeded in harpooning and killing the calf, to which the boat in which he was remained fast.

Some considerable time after the plaintiff had lanced the whale—many of the witnesses said, half an hour—it was discovered that the defendant's line, attached to his harpoon which was fast in the whale, was severed very near to the harpoon, and that the fish was loose. How the line became severed did not clearly appear. None of the witnesses stated that the whale had made any struggle at this time which could have broken the line; and defendant's harpooner

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swore that when the line became disengaged from the fish he had felt no strain on the line, and did not know that the fish was loose until some of those present called out that she was so.

He further stated that, when plaintiff was working at the whale with his lance, he had gone close to that part of the whale in which defendant's harpoon was fast; and that although he did not actually see the lance cut the line, he could swear that plaintiff had then cut the line, and he produced the end of the line, which appeared to have been partly cut and partly broken. But—from the manner in which this witness gave his evidence, and from no other witness being brought to corroborate this part of it, although, if true, many persons must have seen what the witness stated he had seen—the Court were unanimously of opinion that there was not evidence on which the Court could place reliance, either that the end of the rope was in the same state in which it had been at the instant that the whale had got loose, or that it had been cut by plaintiff. After the whale was loose, she, with defendant's harpoon sticking in her, swam out some distance to seaward, pursued both by plaintiff's and defendant's boats, and, making a circle, was returning towards the spot where she had got loose, when she was harpooned by the plaintiff, to whose boat her turning had brought her nearer than to the defendant's, and was also immediately after harpooned by the defendant. She was then lanced by plaintiff, and killed while both boats were still fast to her. Plaintiff then took hold of that part of defendant's line which was still attached to the harpoon in the whale, and said,—"Miller, your line was broke; come, let us go half and half."

Defendant refused, and, having the strongest party, carried off the whale to his fishing station, notwithstanding plaintiff's remonstrances, and in process of time boiled the blubber and secured the oil, while the plaintiff carried off the calf.

At the trial the plaintiff called three of his boatmen, who swore that the whale had not spouted blood at all before plaintiff lanced her while defendant's boat was still fast to her, and then only thin blood; and that she had not spouted thick blood until the plaintiff had harpooned and lanced her after she had got loose from defendant's boat, and that if the officers of the men-of-war swore that she had been spouting thick blood when passing among them before she went to the North Battery, they had sworn what was not true. They also swore that when the whale got loose from defendant, she was not rolling, but swam away, fresh and right on.

And three apparently disinterested witnesses, who stated

that they had been in a bum-boat alongside H.M.S. *Nimrod* when the whale with defendant's boat fast to her swam past the *President*, and that they had not observed her spout blood at all until she had got near the battery (to which they had followed her), two of them said not until after she had been there lanced by plaintiff, and all three that even then, she only spouted thin blood and water.

On the other side, the defendant put in the depositions which had been taken *de bene esse*, before the *President* sailed, of one of her mates, her second master, a midshipman, and the gunner, and called the master gunner of H.M.S. *Seringapatam*. The mate and the master had seen some whaling in the South Seas, and the master gunner, before entering the Royal Navy, had made four voyages in whalers to Davies' Straits, and had seen a great many whales killed.

The *President's* officers swore that they had seen and observed the whale while swimming up and down among the men-of-war with defendant's boat fast to her; that she was then spouting black blood, moving very slowly, and rolling about. The midshipman stated that he heard her groaning; and the master, that he saw her while under the battering rolling and floundering about as if in great agony, before the plaintiff's boats got up to the spot.

The gunner of the *Seringapatam* stated, that while going from the *President* she was spouting blood, the first blast or two being thin blood; that he then went to the main-top with a glass to watch the whale, and that he then saw her spout black blood; that he had never known a whale that had once spouted blood escape in fine weather.

All these five witnesses were of opinion that the whale had received a mortal wound before she came among the men-of-war; and that, although she had got loose, she could not possibly have escaped from the defendant's boats, although the plaintiff's boats had never come near her.

Defendant also called the master of an American whaler, who stated that he had been engaged in the whale fishing for twenty years; that he had heard the depositions of the officers of the *President* read, and that if their evidence was true it proved that the fish had previously received a mortal wound; that a whale's spouting blood is a sign that it is a dead fish,—that is to say, that it cannot recover, because it is a sign that the whale's lights have been cut, and when they are cut the fish cannot live long; that he had known a whale live six hours after it began to spout blood, but had never known a whale that had once spouted blood escape, except in rough blowing weather, which prevented the boats from being able to work up to the whale.

The defendant also called three apparently disinterested

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" 30.

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witnesses, who had been out in boats looking at the whale, and who all swore that they had seen her spouting blood before the plaintiff's boats had got near her. And all the defendant's witnesses swore that after the whale had got loose from defendant, the circle which she made was not above two or three hundred yards in length, and that she was then swimming very slow, and rolling.

Porter, A.G., for the plaintiff, referred to *Fennings* vs. *Lord Granville*, 1*st Taunton*, *p.* 240, as showing that the Court of King's Bench in England had decided that in all disputed cases about the right to captured whales, the Court would decide according to the regulations which had been established by long usage among the Greenland whalers; and referred to the chapter on the laws of whale fishery in *Scoresby's Arctic Regions*, *vol.* 2, *p.* 312, which he maintained established plaintiff's exclusive right to the whole whale, because after she got loose from defendant's boat she was a *loose fish*, as much as if defendant had never harpooned her; and having been harpooned and made fast by plaintiff while she so was a *loose fish*, and killed while she was still fast to his boat, no assistance given by defendant in the killing entitled him to claim any share of the whale. He also referred to *Inst. l.* 2, *tit.* 1, *sec.* 13, and *Voet*, 41, 1, *sec.* 7, and maintained that the law of the Greenland fishery, was in conformity with the principles of the civil law to which he had directed attention.

Ebden, contra, maintained that even if the Greenland regulations were to be recognized by this Court—which he argued they ought not—the true construction of the term a *fast fish*, as contradistinguished from a *loose fish*, is a fish which has been so wounded as that it cannot possibly escape, even although adrift, and not merely a fish which is fast by a rope. (*Stair's Inst.* 2, 1, *sec.* 33.) Before the plaintiff interfered, the whale had been so wounded by defendant that it could not possibly have escaped from him, although plaintiff's boats had never come near the whale. He also maintained that the plaintiff, by lancing the whale while still fast to the defendant's boat, had given such intimation that in assisting in killing the whale he intended merely to give friendly assistance, and not to act on his own account, as brought his case under the exception to the general rule specified by *Scoresby*, *vol.* 2, *p.* 327.

Cur. adv. vult.

Postea (December 30, 1848).—The Court held that although the Greenland Code of Laws regulating the whale fishery ought to have effect given to it by Courts of Justice in deciding questions as to the right of property in whales

killed at the Greenland fishery, that code ought not to have effect given to it in cases arising in other parts of the world, where it was not proved to have been adopted and established by long and invariable usage. In the case of *Fennings* vs. *Lord Granville*, 1*st Taunton*, the Court of King's Bench decided that the Greenland Code ought not to be given effect to except in cases arising in the course of the Greenland fishery. There is no proof of any rules, laws, or usage regulating the whale fishery in Simon's Bay or in the sea adjoining the coasts of this Colony; and therefore, the Court must decide the present case according to the principles and rules of the Roman-Dutch law respecting the acquisition of the right of property in animals *feræ naturæ*. (*Voet* 41, 1 4. D. 41, 1, 2, 6.)

MENZIES, J., held that the evidence proved that, before the whale got loose from defendant's boat, he had so mortally wounded it as to render it unable to keep the sea, and so mastered it as to make it impossible for it to have escaped from him if left to himself. That any interference by the plaintiff at this period was unwarrantable, as being contrary to law and justice, except for the purpose of giving friendly assistance to the defendant; and, therefore, that the defendant was entitled to the whole whale, and consequently to judgment in his favour, with costs.

WYLDE, C.J., and MUSGRAVE, J., would have come to the same conclusion if they could have taken the same view of the evidence as MENZIES, J.; but they found the evidence adduced by the different parties so contradictory as to the state in which the whale was when harpooned by the plaintiff, that it was not sufficiently proved to their satisfaction that it was not possible that the whale might have escaped or been lost if the plaintiff had not interfered; and, therefore, that the plaintiff was entitled to some share of her. If the evidence had enabled them accurately to estimate the value of the assistance given by the plaintiff, they would have proportioned his share accordingly; but as the evidence did not enable them to do so, they had no other alternative than to award each party half the net proceeds of the whale.

The judgment of the majority of the Court, therefore, was, that the plaintiff should have one half of the net proceeds of the whale, each party to pay his own costs.

MAYNARD *vs.* PROPRIETORS OF COLONIAL BANK.

Banking company, application for interdict to prevent dissolution of, competent.

1849. June 26.

Maynard vs. Proprietors of Colonial Bank.

Porter, A.G., and *E. B. Watermeyer* moved for an interdict on behalf of the applicant to restrain the respondents from acting upon certain resolutions to which the bank had come with respect to dissolution.

The motion was made under the following notice:—

"To the Proprietors of the Colonial Bank.

"GENTLEMEN,—Please to take notice that application will be made on Tuesday next, at one o'clock in the afternoon, or so soon after as counsel can be heard, to the Supreme Court, for an interdict to restrain you, and any of you, from acting upon certain resolutions passed at a meeting of shareholders or proprietors of the above-mentioned Colonial Bank upon the 25th day of May last, which were to the effect following:—

"First. That the 47th section of the deed of agreement of the said bank be repealed, and the same was thereby declared to be repealed, in order to its modification; and that the said 47th section should thenceforward be as follows, that is to say,—That the said bank shall continue down to and until the thirtieth day of June next, and no longer.

"Secondly. That certain persons in the said resolution named, as by reference thereto will appear, or the majority of them, be constituted a committee to arrange the affairs of the said banking company upon the dissolution thereof, in such a manner as to permit the shareholders, or those authorized by them respectively, to receive their due and proper share of the stock and assets of the said company,—or the amount or value of the same. Such interdict to continue until an action shall be determined to set aside the said resolution, and of having it declared that it is not competent for the proprietors of the said company to entertain such proceedings,—or failing that, that the said applicant shall be entitled to be paid by the company the capital stock which he has contributed to the company for the certain ten shares purchased by him from the said company, together with a just proportion of the profits arising therefrom, with the costs of the application.

"Yours, &c.,

"J. & H. REID.

"Cape Town, June 23, 1849."

The circumstances, as they appeared from the applicant's affidavit, were these:—The bank was established in 1844, and by the 34th section of the deed of agreement it was declared that it should not be lawful for the directors to cause to be issued and circulated any cash notes or promissory notes. And by the 48th section it provided that any sections of the deed might be altered or modified, with the exception of the 34th, by nine-tenths of the proprietors present at a meeting, duly called, the 34th being declared to be absolute and irrevocable to all intents and purposes.

In November, 1846, two hundred reserved shares were sold by the bank, and Mr. Maynard purchased ten of these at the rate of £42, and subsequently having paid an instalment of £5, his shares cost him £47.

The whole amount paid by original proprietors was £30 per share, so that the applicant paid £17 premium per share.

By the 47th section of the deed it was provided that the bank should continue until 1865; and that then a certain majority should have power to extend its continuance under limits in the section mentioned,—"Provided, however, that if at any time the losses of the bank should have exhausted all the surplus funds, and also one-fourth of the paid-up capital, then upon a meeting called, the bank should be dissolved," unless three-fourths of the proprietors present should decide on proceeding and indemnifying the dissentients.

At a special general meeting of proprietors, held at the bank on the 25th May, 1849, the following resolutions were passed:—"Whereas it is expedient for the interest of the shareholders of the Colonial Bank that the present copartnership be brought to a close, and a new one formed, subject to and under the provisions of the present deed of settlement, with such modifications of the same as may tend to place the bank upon a basis calculated to afford greater facilities to the commercial and agricultural interests of this Colony: Resolved,—That the 47th clause or section of the deed be, and the same was thereby repealed, in order to its modification, and that the 47th section of the deed should thenceforward be as follows:—'That the bank shall continue down to and until the 30th June next, and no longer.'"

An amendment was moved to the effect that no alteration whatever should be made in the trust deed without the unanimous consent of the shareholders.

The original motion was carried by a large majority, exceeding the nine-tenths required by the 48th section, to repeal or modify any clause of the trust deed.

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The other resolutions alluded to in the notice were proposed and carried.

It was contended on behalf of the applicant that the majority of the proprietors had no right to revoke the 47th section, fixing the time the bank was to last, and that the proviso in that section fixing the circumstances under which the bank should be dissolved, proved sufficiently that the general words of the 48th section, giving the proprietors a right to repeal or modify, did not apply to this section. It was by the 47th section fixed when, and when only, the bank should be dissolved by any number less than the whole of the shareholders. The power of repeal or modification given to the majority in the 48th section was clearly for the purposes of carrying on the business of the bank on its fundamental principle—that of not issuing notes—and not referrable to the dissolution of the bank at all. The proprietors by the 48th section were forbidden to repeal the 34th section, that pledging the bank not to issue. Now by their act they repealed the 34th section in addition to all the others; they had, therefore, acted beyond their power, and the Court were called upon to restrain them from acting upon the resolution then taken by them, contrary to their deed of settlement. But even if the Court should think the bank rightly dissolved, the applicant was entitled to the amount actually paid by him to the bank for his shares, he having paid the high premium on account of the seemingly flourishing state of the bank as stated by the directors at the time of the sale of the reserved shares, and not with reference to the sum which would come to him if the assets of the bank were divided equally among the shareholders, original, as well as purchasers of the reserved shares, and by which calculation the purchasers of reserved shares, and among them the applicant, would lose, while original shareholders would still gain a few pounds per share.

Brand and *Ebden* opposed the application, and contended that by the 48th section the proprietors were empowered to repeal any section, whether it referred to the duration of the bank or not. The 48th section only provided that as long as the bank existed it should remain a bank on one principle of not issuing; but the nine-tenths were soon authorized to dissolve the bank, as well as to repeal the other clause: because the power given was so great, it was required that the majority should be so large. The majority had not offended against the deed, but it would be absurd to expect that if there existed almost entire unanimity, as in the present case there was, the whole number of the proprietors should be prevented from issuing for

their own interest by one or two dissentients. The second question was not matter of interdict; if the applicant thought himself injured by the proceedings of the directors in dividing the capital and profits equally among the shareholders, and could prove such injury, his remedy was at law, and not by interdict.

The respondents produced an affidavit to the effect that the applicant was a director and large shareholder in the Union Bank, a bank of issue, established in March, 1847, subsequently to his purchase of the reserved shares for the high price mentioned; and that, after the establishment of this bank, the value of the Colonial Bank shares had diminished in the market, which was the reason that in the division the shares would amount to a sum considerably less than the amount paid by applicant, but yet somewhat above the amount paid by the original proprietors.

The Court refused the application, the CHIEF JUSTICE holding that, although he could not say that the majority of the proprietors were entitled to come to the resolution of dissolving this bank as they had done, yet if the applicant were thereby injured he had a remedy at law; and, therefore, the extraordinary remedy of interdict did not apply. MENZIES, J., and MUSGRAVE, J., were of opinion that the matter as to the dissolution had been rightly brought before them by way of interdict, but that under the several sections the proprietors were fully entitled to act as they had done.

With respect to the second point in the motion, the amount to which applicant would be entitled for his shares, the Court were unanimous that there was no ground for interdict.

Interdict refused, with costs.

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